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NO. 20129 and 20130

IN THE
**UNITED STATES
COURT OF APPEALS**
For the Ninth Circuit

In the matter of the Petition of AMERICAN MAIL
LINE LTD., a corporation, owner pro hac vice of the
American Oil Screw ISLAND MAIL, Official No.
241157, for exoneration of liability, et al.

UNITED PACIFIC INSURANCE COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

LANE, POWELL, MOSS & MILLER
JONES, GREY, KEHOE, HOOPER & OLSEN
MARTIN P. DETELS, JR.
HARRY B. JONES, JR.

Attorneys for Appellants

Of Counsel:

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1700 Washington Building
Seattle, Washington 98101

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UNITED PACIFIC INSURANCE COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

I.

**STATEMENT OF PLEADINGS AND
JURISDICTIONAL FACTS**

On May 29, 1961, at about 1542 hours PDST, while
en route from Seattle to Bellingham, Washington,
the 474-foot American flag cargo vessel M/V
ISLAND MAIL struck an uncharted rock, at ap-
proximately 48° 19.35' north latitude, 122° 53.3' west
longitude, sustaining severe damage to her hull and

substantial damage to her cargo (Findings of Fact Cause No. 16875, #1, 2, 15, 22, R. 146, 149, 153) [hereinafter cited as FF].

The casualty spawned much litigation.

The Petition of the vessel's charterer, American Mail Line, Ltd. for Exoneration from or Limitation of Liability, and five other cases, were consolidated for trial (Docket entry of September 23, 1962, Clerk's Record 5) [hereinafter cited as CR] and tried in the United States District Court for the Western District of Washington, commencing October 13, 1964. Of these six actions three are now on appeal to this Court, having been brought here on a unified record and consolidated for purposes of briefs and argument by stipulation of the parties and order of this Court entered September 20, 1965.

The three cases on appeal arose as follows:

1. *Appellate Cause No. 20129, In Re American Mail Line, Ltd.* This action was commenced by the filing of a Petition for Exoneration from or Limitation of Liability by American Mail Line, Ltd. (hereinafter "Mail Line"), the demise charterer of the ISLAND MAIL and was numbered Admiralty No. 16733 in the District Court. Claimants, Insurance Company of North America, et al (insurers and/or owners, shippers or consignees of cargo aboard the ISLAND MAIL) filed their answer to the said petition and their claims (CR 206, 198), seeking recovery for loss and damage to their cargo.¹

1. Motions were later made to amend both the Answer and Claims (CR 226; 210), but hearing and decision on the Motions was reserved, the matter having been set for trial on the issues of jurisdiction and liability only (Docket entry of September 23, 1962, CR 5; Pre-Trial Order, Par. 2, CR 82) [hereinafter cited as PTO].

The District Court had jurisdiction of the proceeding under Title 28, U.S.C. § 1333, R.S. 4285, as amended, Title 46, U.S.C. § 185, and Supreme Court Admiralty Rules 51-54, inclusive.

After entry of Findings of Fact and Conclusions of Law (CR 228) and Decree (CR 240) on December 18, 1964, dismissing the cargo claims with prejudice, Appellants (who are identified in the Record at CR 244) timely filed their Notice of Appeal on March 16, 1965 (CR 243). This Court has jurisdiction of the appeal under the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C. § 1292 (3), and Supreme Court Admiralty Rule 55.

2. *Appellate Cause No. 20130, United Pacific Insurance Company, et al v. United States of America.* This action was commenced by the filing of a libel on May 14, 1963 by United Pacific Insurance Company and other insurers, owners, shippers or consignees of cargo aboard the ISLAND MAIL (the parties appealing are listed at CR 181), seeking recovery from the United States for loss and damage to private cargo, including reimbursement for the amounts of their respective contributions in General Average, as might ultimately be determined. The case was docketed as No. 16875 in the United States District Court for the Western District of Washington and consolidated with the Limitation action. The District Court had jurisdiction of the libel under Section 2 of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 STAT. 525, as amended, Title 46, U.S.C. § 742.

After entry of Findings of Fact and Conclusions of Law (CR 145) and Decree (CR 162) dismissing the libel with prejudice, on December 18, 1964, appellants timely filed their Notice of Appeal on

March 16, 1965 (CR 180). This Court has jurisdiction of appeal under Title 28, U.S.C. § 1291.

3. *Appellate Cause No. 20266. United States of America v. Dewey Soriano.* This action was commenced by the filing of a libel by the United States of America to recover from the pilot of the ISLAND MAIL, Dewey Soriano, the damage sustained by it as a result of the casualty (CR 259). The case was docketed as No. 16853 in the United States District Court for the Western District of Washington. The District Court had jurisdiction of the cause under Title 28, U.S.C. § 1333 (1).

After entry of Findings of Fact and Conclusions of Law (CR 268) and Decree on December 18, 1964 (CR 298) dismissing the libel with prejudice, appellant United States timely filed its Notice of Appeal on March 16, 1965 (CR 300). This Court had jurisdiction of that appeal under Title 28, U.S.C. § 1291.

The parties to the appeals so consolidated are as follows:

(a) Appellants Insurance Company of North America, et al, in Cause No. 20129 and appellants United Pacific Insurance Company, et al, in Cause No. 20130, are jointly represented and this opening brief is submitted on behalf of both sets of appellants, hereinafter sometimes called "Private Cargo."

(b) The United States of America, as appellee in Cause No. 20130 and as appellant in Cause No. 20266.

(c) American Mail Line, Ltd. as appellee in Cause No. 20120.

(d) Dewey Soriano as appellee in Cause No. 20266.

II.

STATEMENT OF THE CASE

A. Summary of the District Court's Findings
and Conclusions.

Before setting out what must necessarily be a lengthy factual statement, it may be helpful to summarize the trial court's disposition of the ultimate issues in each of the three cases.

1. In Private Cargo's suit against the United States, the District Court found that the Government was "negligent, perhaps grossly so," (Oral Opinion, Tr. 1142, incorporated in Finding of Fact 43, CR 160) in failing to correct erroneous information it had previously published to mariners and placed upon the several charts of the casualty area published by the Government, but that such negligence was not a proximate cause of the ISLAND MAIL casualty which, for purposes of this case, it found was caused solely by the failure of the pilot Soriano to check the position of the vessel and make an allowance for set of the current, thereby permitting the vessel to penetrate the "10-fathom curve," which it found to be a warning of danger in that area (FF 39, 40; CR 159).

2. In the case of the *United States v. Soriano*, the District Court found that the Government had failed to sustain its burden of proving the pilot negligent (Conclusion of Law 3; CR 279). It found that the Government had failed to prove, as against the pilot, that the ISLAND MAIL had penetrated the 10-fathom curve or that it had struck the rock which all parties to the proceedings below and to

these appeals, except Soriano, stipulated that it had struck.

3. In dismissing the claims of Private Cargo against the charterer in the limitation action, the District Court found the ISLAND MAIL seaworthy and that Mail Line had used due diligence to make her so, although it was undisputed that Mail Line knew that the vessel's fathometer or echo sounding machine was inoperable at the commencement of the voyage (PTO, CR 15; FF 8, CR 231). As in the Private Cargo-Government case(but not in the Government-Pilot case), the District Court concluded that the casualty was caused by the act, neglect and default of Pilot Soriano in the navigation of the vessel (Conclusion 5, CR 237-8).

The "bare bones" of Private Cargo's appeal in No. 20130 is that the District Court erred in finding and concluding that the negligence of the United States was not a proximate cause of the ISLAND MAIL casualty.

The "bare bones" of Private Cargo's appeal in No. 20129 is that the District Court erred in finding and concluding that the ISLAND MAIL was seaworthy, despite her inoperable fathometer, in the light of its concurrent finding in No. 20130 that the proximate cause of the casualty was negligent penetration of the 10-fathom curve, a fact immediately ascertainable from a functioning fathometer had the ISLAND MAIL been so equipped.

B. Facts Pertinent to Private Cargo's Appeal Against the Government

The principal issue on the appeal in the case of United Pacific Insurance Company, et al, against the United States is a mixed issue of law and fact.

Private Cargo, the United States, and American Mail Line were all agreed that the ISLAND MAIL struck a rock at approximately 48° 19.35' N. Latitude, 122° 53.3' West Longitude (See their respective contentions in the Pre-Trial Order at CR 36 [Par. 1], CR 43 [Par. 2], and CR 74 [Par. 31]). The District Court so found in the Private Cargo-Government (FF 15, CR 149) and Private Cargo-Mail Line (FF 10, CR 232) cases. The District Court described this as the 3.5 rock (FF 43, Oral Opinion, Tr. 1130).² At the time of the ISLAND MAIL casualty, the rock was not shown on Government-published charts (FF 15, CR 149).

It was and is the contention of Private Cargo that, in striking the 3.5 rock on May 29, 1961, the ISLAND MAIL pushed the rock over, from west to east, and that on June 18, 1952, the vessel CHARLES CROCKER had struck the same rock, in the position in which it existed prior to contact by the ISLAND MAIL. The heart of Private Cargo's case is that the Government was negligent in disseminating erroneous information to mariners, in failing to correct such erroneous information, in publishing inaccurate charts, and in failing to disseminate information it received concerning the CROCKER casualty, and that such negligence of the Government was a proximate cause of the ISLAND MAIL casualty. The District Court found the Government "negligent, perhaps grossly so" in these respects (FF 43, Oral Opinion, Tr. 1142; FF 41, CR 158-9)

2. This rock was determined by Navy divers to have a least depth of 22 feet below the surface of the water at mean lower low water, in the position in which it was found on July 13, 1961. (PTO Par. 10, CR 19-20). The designation "3.5 rock" was used, and will be used herein, for convenient reference. 3.5 fathoms = 21 feet.

but it further found that the CROCKER had struck a different rock (FF 43, Oral Opinion, Tr. 1143-5; FF 38, CR 158), and that the negligence of the Government in its handling of information concerning the CROCKER casualty was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145; FF 39, CR 158).

In describing Private Cargo's contentions, the District Court termed them "the most probable possibility" and "convincing." (FF 43, Oral Opinion, Tr. 1138, 1143). Nevertheless, the Court rejected the contention as "speculation and not supported by the evidence" (FF 43, Oral Opinion, Tr. 1143). In so ruling, the District Court failed to give to circumstantial evidence that consideration which this and other courts have said it must receive in cases like this.

Because it rejected appellants' factual theory (which was not only "the most probable possibility" and "convincing," but had the added virtue of being the only theory that could satisfactorily explain the two casualties that will be discussed below) the District Court found no causal relationship between the respondent's negligence ("the Government was negligent, perhaps grossly so,") and the casualty.

The material evidence pertinent to the appeal of Private Cargo against the Government was as follows:

1. The ISLAND MAIL Casualty:

The motor vessel ISLAND MAIL while proceeding from Seattle to Bellingham on May 29, 1961, attempted to pass west of Smith Island in the Straits of Juan de Fuca. Passage to the east of Smith Island was preferable, but these waters were

denied to the use of the vessel by reason of their use by the Government as a naval exercise area (PTO Par. 18, CR 17).

Departure from Seattle was taken at 1139 hours PDST, at low water. From then until the casualty, the tide was flooding, the weather clear and sunny, seas calm, visibility good and wind slight (FF 5, 6, CR 146, 147).

At all material times, the vessel was being conned by Dewey Soriano, a licensed State pilot, whose employment was compulsory under State law (FF 3, CR 146). Its Master was Captain H. D. Smith. The Mate on watch at the time of the casualty was 3rd Mate H. G. Gunderson (FF 2, CR 146).

The ISLAND MAIL was partially loaded, with drafts as follows: forward 24' 0"; aft 29' 2"; mean 26' 7". It was down by the stern a distance of .01139 feet per foot of registered length (FF 7, CR 147).

At 1542 hours, the approximate time of the casualty, the tide was 5.4 feet above mean lower low water in the area of the casualty (FF 5, CR 147).³

At 1542 hours, while rounding Smith Island, the ISLAND MAIL hit an uncharted obstruction, tearing a long gash in her hull, and necessitating that it be intentionally beached at Ship Harbor, Anacortes, Washington (FF 15, 22, CR 149, 153). A number of her crew members reported experiencing at the time of the impact a heavy list to the port, a slowing down of the vessel and then a roll back to the starboard (for example, see Coast Guard Tran-

3. The depth datum appearing on all U.S. charts set forth soundings at mean lower low water. For example, the least depth of water over the "3.5 rock," when located on July 13, 1961, was 22 feet at mean lower low water. At the time of the casualty, if it then rested in its present posture, it was 27.4' below the surface (FF 19, CR 152).

script, Exhibit 139, pp. 33, 36, 83, 85, 86, 100, 117, 165, 220, 286, 292)⁴ (hereinafter cited as CG Tr.). Her Master, Captain Smith (and also her pilot Captain Soriano) further elaborated on this sensation as that of the ship first taking a heavy port list, then seeming to be hung up on something for a few seconds, after which the ship gained momentum and shifted to a starboard list with sort of a "fishtail motion" or "corkscrewing motion" (Tr. 579, 580, 67-69, 445-448). The deck watch officer, Mr. Gunderson, testifying at the Coast Guard hearing before the 3.5 rock was found, described the impact as follows:

"She more or less raised up and also laid over to port about 15 degrees. Then she rolled back over to starboard about ten degrees, and actually, it felt like we rolled something over . . . after we inspected the bottom [of the vessel] I wondered if we rolled off a rock, or something like that, and that made that sensation of rolling over" (CG Tr. 286-7).

Immediately following the impact several crew members made observations astern of the vessel and saw nothing on or extending out of the water, not even kelp, only some discoloration (CG Tr. 168, 169, 180, 198, 223).

2. Damage to the ISLAND MAIL:

Both private and governmental photographs of the damaged areas of the vessel's hull were taken and received in evidence as Exhibit 37. Nine of these photographs have been reproduced in a Book of Exhibits for the use of the Court.

4. It was stipulated that specified portions of seven volumes of the transcript of testimony at a Coast Guard Investigation into the ISLAND MAIL casualty could be received in evidence. CR 89. The pertinent volumes were marked as Ex. 139 Tr. 1145.

The photographs and the testimony establish without dispute that the initial point of impact was under the No. 1 hatch, at approximately Frame 159, at a height of approximately three feet above the keel on the starboard side (Tr. 609-10). The damage became progressively more severe proceeding aft, and terminated suddenly in the area of the forward engine room bulkhead, at approximately Frame 110, where the damage extended on both sides of the keel. The "aftermost" point of damage was in the vicinity of Frame 110, where an area 20 feet in width was "ripped out—gashed—damaged." The damage ended abruptly at that point, with only "a few score lines" extending aft. While the vessel was on dry-dock Captain Smith took rocks or rock fragments from the damaged hull in the areas of Frames 157 and 110⁵ (Tr. 610-612). So did Pilot Soriano, who described the aftermost damaged area as appearing like the "crown of a helmet" (Tr. 489).

"The indentations in the hull in vicinity of Frames 152 and 153, as evidenced by Photograph No. 1598-74 and Federal Bureau of Investigation Photographs A-2 and A-3 of Exhibit 37, conform to the contour of the westerly side of the bulge on top of the easterly side of the rock as sketched in Exhibit 119" (FF 18, CR 151-2).

The ISLAND MAIL was, as has been stated, down by her stern—that is, she was deeper in the water where the damage terminated, at Frame 110, than at the point of initial impact, Frame 159.

-
5. Ship hull frames are numbered consecutively from the stern forward to the bow. Frame 159 is forward of Frame 110. See Capacity Plan (Ex. 51).

3. The Search for the ISLAND MAIL Rock:

On about June 14, 1961, during a recess in its investigation of the ISLAND MAIL casualty, the United States Coast Guard requested the United States Coast and Geodetic Survey to determine "the exact position of a reported wreck which was charted about 2½ miles roughly off the west side of Smith Island to determine the least depth over the wreckage. Also to extend the investigations sufficiently to locate any other uncharted obstruction" (CG Tr. 829-830)⁶

The undisputed findings of the survey team were as follows:

"16. Following the incident on May 29, 1961, involving the M/V ISLAND MAIL, and during July, August and September, 1961, the Government through its Coast and Geodetic Survey undertook hydrographic and wire drag surveys in the area west of Smith Island.

"The hydrographic survey of the area west of Smith Island in 1961 consisted of making accurate fathometer recordings at parallel tracks spaced approximately 100 meters apart, comparison with earlier sounding charts, and more detailed soundings of hydrographically suspicious area.

"The wire drag surveys consisted of suspending a wire between two vessels at an accurate predetermined depth and sweeping an area. Any obstruction which the wire strikes causes surface buoys to submerge and this will be immediately observed by the survey party. Wire drag operations at various depths were conducted throughout the area west of Smith

6. The "reported wreck" referred to a legend placed by the Coast and Geodetic Survey on published charts of the area, following the CROCKER casualty which will be referred to in detail later in this statement.

Island. Wire dragging was limited to the westerly edge of the 10-fathom curve and did not extend inside of 1.7 miles west of Smith Island Light, except as shown on Exhibit 22 and did not extend further for the reasons stated in Exhibit 49.

"These special surveys extended over a three-month period. The position reported by Pilot Soriano and master and third-mate of the M/V ISLAND MAIL as the point of impact was determined to have a least depth as indicated on Exhibit 22.

"17. Although the hydrography undertaken in 1961 was detailed, it failed to uncover the existence of any uncharted rock at or near 48°19.35' North Latitude and 122°53.3' West Longitude. At this position a rock was thereafter discovered by Navy divers on July 13, 1961. This rock is approximately 18 feet high, 20 feet wide and 25 feet long and has a least depth of 22 feet below the surface of the water at mean lower low water. The rock is located 1.87 miles westerly of Smith Island Light. This rock will be hereinafter referred to as the 3.5 rock" (FF 16, 17; CR 149-150).

a. The rock bore marks of recent contact with metal on its *easterly* top side, as it then lay (CG Tr. 1130, 1131, 1135, 1140, 1141, 1175, 1177, 1178, 1197, 1202, 1216, 1217, 1219, 1223, 1232; Exhibits 108A and 108B).

b. The top of the rock did not appear to have been broken off (CG Tr. 1120, 1146, 1157, 1258).

c. The rock also showed that the contact with metal extended down on the rock, i.e., southerly, possibly as much as four or five feet (CG Tr. 1217, 1239, 1202).

d. Where the contact with metal on the rock was

observed, metal was actually embedded in the rock and appeared to have been driven into it (CG Tr. 1131, 1135, 1153, 1154, 1218, 1230).

c. The metal indentations or scoring on the rock were in a north-south direction (CG Tr. 1136, 1229).

f. There was evidence of sea growth, including barnacles, having been recently scraped off the rock (CG Tr. 1216-1217, 1220, 1130, 1226, 1128; Exhibit 27).

g. Near the rock were found plates of metal, pipe clamps, and other pieces of metal (CG Tr. 926, 927, 991, 992, 993, 1117, 1136, 1144, 1145, 1147, 1152, 1164, 1220, 1214, 1215).

h. The pipe clamps and some of the metal pieces which were recovered from the bottom were found to be covered with oil (CG Tr. 994, 1180, 1181, 1240) and no marine growth appeared on any of the items of metal which were recovered from the bottom (CG Tr. 1242, 1243, 994-995, 1193).

i. The metal plates which were brought to the surface appeared to have been freshly broken since the edges had a shine and where the rust had accumulated it was of such a texture to indicate it was very recently deposited in the water. (CG Tr. 1241-1242). Also near the rock were evidences of paint fragments of the type generally used on the bottom of a ship (CG Tr. 1120, 1123, 1124, 1130, 1135, 1153, 992).

j. The pieces of plate brought to the surface were found upon later analysis by the FBI Laboratory, to be metallurgically consistent with the steel in the hull of the ISLAND MAIL (Tr. 212-226; Exhibit 131).

It was the opinion of those who surveyed the rock and surrounding area that the 3.5 rock had been hit by a large ship (CG Tr. 1184, 1185; Exhibit 48).

"The indentations in the hull in the vicinity of frames 152 and 153, as evidenced by photographs No. 1598-74 and FBI photographs A-2 and A-3 of Exhibit 37 [See Book of Exhibits] conform to the contour of the westerly side of the bulge on top of the easterly side of the rock as sketched in Exhibit 119" (FF 18, CR 151-2).

The extensive studies described by the District Court in its Findings of Fact 16 and 17 failed to disclose the existence of any other uncharted obstruction in the entire area of search, except a previously unknown group of rocks at approximately 48.19.5' N. Latitude, 122°52.9' W. Longitude, approximately 1.6 miles westerly of Smith Island Light. These rocks had a least depth of 25 feet below the surface at mean lower low water (FF 17, CR 150-151). On the plus 5.4 foot tide existing at the time of the ISLAND MAIL casualty, the least depth was 30.4 feet. No party contended below that the ISLAND MAIL struck this "4-fathom rock."⁷

4. Contact between the ISLAND MAIL and the 3.5 Rock.

The evidence establishes that the ISLAND MAIL struck the 3.5 rock and pushed it over, from west to east. The rock measured 18 feet by 20 feet by 25 feet, and as located and measured in July, 1961, its greatest dimension, 25 feet, was on a generally north-south horizontal axis and the least depth of

7. The District Court further specifically found that the 4-fathom rock was not struck by the CHARLES CROCKER in 1952 (FF 38, CR 157-8).

water over it at mean lower low water was 22 feet. At the plus 5.4 foot tide prevailing at 1542 hours, the time of striking, the top of the rock was 27.4' below the surface (FF 19, CR 152), if it then rested in its present posture.

The draft of the ISLAND MAIL at the point of initial impact on her hull was 24' 8.64" and it is undisputed that, had the ISLAND MAIL been dead in the water with the middle of her No. 1 hatch directly over the 3.5 rock, there would have been over 2 feet 7 inches of clearance between the top of the rock (as it existed on July 13, 1961) and the vessel's keel (FF 43, Oral Opinion, Tr. 1133; FF 20, CR 152). Since the initial point of indentation in the hull was at a point three feet above the keel, there would have been over 5 feet 7 inches clearance between point of impact on ship and rock, assuming the rock to have been in the July 13, 1961 position, at the time it was struck by the ISLAND MAIL on May 29, 1961.

No evidence of any fact or circumstance which could have brought the ISLAND MAIL into contact with the 3.5 rock, as that rock lay on July 13, 1961, was submitted.

The Government did produce a witness, Anselm Beal, of the David Taylor Model Basin, who testified to the phenomenon of sinkage (CR 312-350). His testimony can be summarized briefly by saying that he testified to various increases in draft which sinkage would produce in a C-2 vessel, having the stationary drafts of the ISLAND MAIL, the extent of increase in draft being dependent primarily on speed of the vessel and depth of the water. The range of draft increases testified to by the witness was from one foot forward, four inches astern (at 15.5 knots

in deep water) (CR 320) to two feet eight inches bow and stern (at 14.7 knots after a half-mile run in 36 feet of water) (CR 321). It was later developed that the witness' calculations had been made with reference to a C-2 freighter not shown by the evidence to be sufficiently similar to the ISLAND MAIL to give validity to his calculations and his testimony was received only for the limited purpose of explaining the possibility of contact between a vessel and an underwater object where the draft and water depth, considered exclusively, would indicate a clearance (FF 21, CR 152; Tr. 348-9). In any event, as the District Court found, his testimony as to a maximum mean sinkage of two feet eight inches [under his maximum speed-minimum depth hypothesis] would leave a clearance of over two feet eleven inches between the point of indentation on the ISLAND MAIL and the top of the rock in its July, 1961 position (i.e., with a height of 18 feet) and the District Court found "... there is nothing in the evidence to account for this difference" (FF 43, Oral Opinion, Tr. 1136).⁸

The calculations can be presented as follows:

Depth of Water Over Top of		
Rock at MLLW	22'	
Plus Stage of Tide	5' 4"	
	<hr/>	
Depth of Water Over Rock at		
1542		27' 4"
Depth of Keel at Impact Point	24' 8.64"	
Minus Vertical Distance of		
Impact Point Above Keel	3'	
	<hr/>	
	21' 8.64"	

8. The Court said 2 feet 10½ inches at Tr. 1136, but it was then using the figure +5' 3" for the stage of the tide. It later corrected this figure (FF 19, CR 152).

Plus Maximum Sinkage	2' 8"
Depth of Impact Point	24' 4.64"
Minimum Clearance Over Rock in July, 1961 position	2' 11.36"

Apart from the demonstrable physical impossibility of contact between the ISLAND MAIL and the 3.5 rock, *as it was positioned on July 13, 1961*, other evidence compels the conclusion that, prior to and at the time of the ISLAND MAIL striking, it rested on a different side, with 25 feet (rather than 18 feet) as its vertical dimension, and that it was rolled over by the ISLAND MAIL.

The Watch officer, Gunderson, testifying before any rock had been located by the Government, testified that "it felt like we rolled something over . . . I wondered if we rolled off a rock or something like that, and that made the sensation of rolling something over." (CG Tr. 286-7).

The initial impact on the ISLAND MAIL was on its starboard side, the east side of the vessel. Examination of the rock disclosed evidence of recent contact with metal on *its easterly* side, as it lay on July 13, 1961; clear evidence that the face of the rock which was easterly on July 13, 1961 had been its top when it was first struck by the ISLAND MAIL. No explanation for impact between the easterly sides of two objects—vessel and rock—was offered—and none can be imagined.

The District Court found that "the most probable possibility" was:

" . . . that the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east and that the existing easterly portion of the top was formerly on the westerly side near the top. In such a position the rock would be 25 feet in

height—contact between the vessel and the rock would be possible and the areas of damage to the vessel would be consistent with the markings noted on the south side and the easterly portion of the top of the rock” (FF 43, Oral Opinion, Tr. 1138).

Appendix 5 to this brief is a graphic presentation of the evidence relating to the following:

(1) The relative drafts of the ISLAND MAIL and CHARLES CROCKER and the height above their respective keels of the initial point of damage;

(2) The stage of the tide at the time of the casualty to each vessel;

(3) The depth of water over the rock in its position as found by the divers, and in an upright position.

The sketch was presented to the trial court as an exhibit to appellant's memorandum analysis of the evidence, but was not commented upon by the Court.

5. The SS CHARLES CROCKER Struck The 3.5 Rock In 1952.

Much of the evidence at the trial related to a casualty involving the SS CHARLES CROCKER, a U. S.-flag Liberty, which struck an underwater object in the area west of Smith Island, while en route from Seattle to Alaska, on June 18, 1952.

Private Cargo submits that the evidence at trial

established that the object struck by the CROCKER was the 3.5 rock⁹.

The District Court held otherwise and concluded that since the CROCKER did not strike the 3.5 rock the Government's negligence in connection with that incident was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145). Affirmatively, the Court found that on June 18, 1952, the CROCKER struck a rock somewhere *in the general area* of the rock now shown on the Government Charts as "Rock—4 fathoms—24 feet" (See Ex. 79 A). The Court acknowledged that the Crocker could not have struck the 4 fathom rock itself—over which the CROCKER would have passed with ample clearance (FF 38, CR 158; Tr. 660-6; FF 25, CR 153-4; Ex. 91, 92 a). Thus, the rock which the CROCKER struck, under the District Court finding, is a hypothetical rock, undiscovered and uncharted, about 1.6 miles off Smith Island Light.

The evidence as to the position of the CROCKER at the time of its casualty is set forth in Agreed Fact No. 16 of the Pre-Trial Order (CR 23, 24), in the Enclosures to the Order (CR 85-88) and in the trial testimony of her Master, Captain Dexter Flint (Tr. 638-711).

Briefly summarized, the CROCKER'S Master reported the striking of an obstruction two miles, 281°

9. Alternatively, if the evidence did not compel such a finding, Private Cargo contends that proper non-negligent conduct by the Government in the dissemination of information pertaining to the CROCKER casualty, would have given adequate warning to those navigating the ISLAND MAIL of the necessity for giving a "wide berth" to the area where the 3.5 rock was ultimately discovered. Failure to give adequate warning was negligence which was a proximate cause of the ISLAND MAIL casualty.

T from Smith Island Light. The initial report, relayed by Captain Flint's company to the Coast Guard, was supplemented by an official report from the Master to the Coast Guard at Seattle on July 2, 1952 and a duplicate to the Coast Guard at Portland on July 7, 1952 (Ex. 11, 12). The official report form gave the same location, two miles, 281° T from Smith Island Light, a position 790 feet, or less than two ship lengths, west of the location of the 3.5 rock.

On July 7, 1952, Captain Flint delivered a lengthy report to the Coast Guard at Portland (Ex. 14)¹⁰ stating the same conclusion as the official report with respect to the position of striking, but setting out additional facts, including a chain of five fathometer soundings taken in the six-minute period commencing four minutes prior to the time of striking, as well as a position fix taken one minute prior to striking, which position places the vessel at that time 1.9 miles, 270° T from Smith Island Light, or only about 180 feet west of the 3.5 rock.

Captain Flint was a witness at both the Coast Guard hearing concerning the ISLAND MAIL casualty, and at the trial below. He testified positively and affirmatively to the truth of facts previously reported by him to the Coast Guard, and in particular to the position of the CROCKER striking as two miles, 281° T from Smith Island Light.

No other person aboard the CROCKER was called as a witness, and there was no other evidence

10. Printed as Appendix 2 to this Brief.

offered or received on the issue of its position at the time of striking.¹¹

Cross-examination of Captain Flint by the Government at trial was brief (Tr. 693-709). No attack was made on the bearings or positions testified to by him, or contained in Exhibits 11, 12 and 14 (Appendix 2) submitted by him to the Government in 1952.

Hence, the evidence before the trial court on the issue of the position of the object struck by the CROCKER in 1952 was contained in the testimony of Captain Flint and Exhibits 11, 12 and 14. This information has been plotted on Appendix 3, of this Brief, and is as follows:

1. *Fix No. 1.* Smith Island Light was abeam at 1401 on a course of 340° T, a distance of two miles (Ex. 16). The helmsman was ordered to change course to 039° T, on a rudder angle of 5°, or "easy".

2. *Fix No. 2.* At 1405, the vessel was on a course of 360° with Iceberg Point Light dead ahead and Smith Island Light bore 1.9 miles, 90° T from the CROCKER.

3. *Fix No. 3.* Thirty seconds prior to the time of impact, the helm of the CROCKER had been put hard left, but she was just starting to swing at im-

11. Commander Conway, the Coast Guard officer who conducted an investigation of the CROCKER incident was called by the Government and testified that he had both interviewed and taken the testimony of the CROCKER helmsman, Engineer on watch and the Second Mate. He was permitted to testify as to the information obtained by the Government from them, but "only and solely for the purpose of determining what information was available to the government" (Ruling of Trial Judge, Tr. 1023; see also Tr. 1029). Later Commander Conway was permitted to plot on Ex. 40-A his interpretation of the information obtained by him from the helmsman and second mate.

pact. By interpolation between his pre-impact and post-impact position fixes, Captain Flint determined the point of striking to have been two miles, 281° T from Smith Island Lighthouse.

It is apparent that, when considered in conjunction with the intensive hydrographic studies of a large area, supplemented by wire drag studies of the area from 1.6 to 2.27 miles west of the Smith Island Light, all of which failed to locate any other object which either the trial court or any party has now or ever suggested was struck by the CROCKER, these fixes compel the conclusion that the CROCKER could only have struck the 3.5 rock. If situated in a position with 25, rather than 18, feet as its vertical dimension, the depth of water over its top would have been 15 feet at mean lower low water (22 feet minus 7 feet), and at the plus 4'6" tide at the time of the CROCKER casualty (FF 38, CR 158), its top would have been 19 feet six inches below the surface, which depth should be related to the CROCKER's midship draft of 21 feet 11 inches.

In the face of the incontrovertible proof afforded by the wire drags that the CROCKER could not have struck any object, other than the 3.5 rock, within the wire-dragged area, the District Court found the CROCKER struck a hypothetical rock (as yet uncharted—see Ex. 67, a chart corrected to 1963) just east of the east boundary of the wire-dragged area, the existence of which was not confirmed by the hydrographic surveys or established by any other evidence whatever.

No evidence admitted on the issue supports such a finding. The trial judge based such a finding on the testimony of a Government witness, made the Court's own witness for this purpose, interpreting

the fathometer readings set out in Exhibit 14. The instructions given the witness and his exact testimony, are of such importance that they will be extensively treated below.

The District Court found that the CROCKER struck some hypothetical object about 1.6 miles west of Smith Island Light. This finding was based on testimony of Witness Edmonston. However, as will plainly appear from the following synopsis, in his studies made at the court's direction Edmonston was restricted to two possible courses of the CROCKER off Smith Island, neither of which had substantial support in the evidence. As will further appear, his testimony amounted to no more than this: He found a fair consistency, at a distance of 1.6 miles from Smith Island Light, between two of the CROCKER's pre-impact fathometer readings—and one post-impact reading—on the one hand, and the depth datum given by the 1961 hydrographic studies on the other hand.

Witness Edmonston *did not testify* that the 1.6 mile course was most consistent of all possible courses with the CROCKER's fathometer readings. He *did not testify* that the fathometer readings were incompatible with a course leading the CROCKER over the 3.5 rock. It cannot be overemphasized that his testimony established only this: That the fathometer readings were inconsistent with the 2.2 mile course and that some of the readings were fairly consistent with the only alternative course given him by the Court. (No party to these actions ever contended that the CROCKER had been on a 2.2 mile course, but the witness was nevertheless instructed by the Court to test this course against the fathometer readings.)

The so-called "consistent" course at 1.6 finds other evidentiary support only in a mechanical plotting error by Witness Conway which was called to the District Court's attention and which is inconsistent with all other evidence of the CROCKER's course on June 18, 1952.

In fact, on cross-examination Edmonston agreed that west of the 1.6 mile course (i.e. in the direction of the 3.5 rock) there is a fair degree of consistency on *all* courses, until the bank slopes off west of the 3.5 rock.

Because of the extreme importance of this point we have set out below at some length a synopsis of the instructions given Edmonston by the Court, his testimony in response to those instructions and our comment in connection therewith.

1. At page 998 of the transcript, the trial judge requested the witness Edmonston, former Chief of the Nautical Chart Branch, U. S. Coast and Geodetic Survey, to take the fathometer soundings reported by Captain Flint, as set forth in Ex. 14 (Appendix 2), and relate them to the hydrographic, wire drag and diving investigations made of the area.

2. At pages 1041-1044 of the transcript, in response to a request for clarification, Mr. Edmonston was instructed to assume, in his analysis, that the CROCKER had Smith Island Light 2.2 miles abeam on a course of 340° T, and that it thereafter swung slowly right to 039° T, at a speed of 11 knots. (No party or witness contended that the CROCKER was 2.2 miles off Smith Island Light. Captain Flint explained that the 2.2 distance, which appeared in the CROCKER log, was an error which he corrected immediately (Ex. 11, 12, 14)).

3. At page 1051 of the transcript, Mr. Edmonston was requested to make a study assuming a distance off Smith Island Light of 1.6 miles. This figure was not based on the testimony of any CROCKER witness, but on the plotting of Captain Conway, based upon his trial testimony as to the information by him from the CROCKER'S helmsman and second mate twelve years earlier.¹² In court, Conway plotted the information on Ex. 40-A as "a little over 1.6 miles" (Tr. 1048). Another Conway plot of other information from the same source produced a distance of 1.75 miles off (Tr. 1050). In fact, in arriving at the 1.6 plus distance off Conway had made a plotting error, in that he laid off a course of 339° T to Cattle Point Light, rather than 340° T. He also testified that he had plotted it several times and it usually was 1.7 off. Nevertheless the Court instructed Edmonston to "use 1.6 anyway" (Tr. 1050-1). Proper plotting of a bearing of 340° T from Cattle Point Light produces a distance off Smith Island Light of approximately 1.75 miles.

4. Mr. Edmonston was recalled as the Court's witness at Tr. 1098. At Tr. 1098, he related the five fathometer readings taken from Ex. 14 to the wire drag and hydrographic studies assuming a 1401 distance off Smith Island Light of 2.2 miles and a gradual right turn from that position to 1406, when a hard left was made. His testimony indicated that there was no correlation in the fathometer readings and the determined depths at such a distance.

5. At Tr. 1099, the witness compared the three

12. Objectionable hearsay, which was offered and admitted for the restricted purpose of determining what information was available to the Government (Tr. 1023) whether true or not.

pre-impact fathometer readings with the depth datum, assuming a 1402 position of 1.6 miles off Smith Island Light, and found lesser variations than at 2.2 miles off, i.e.

	<i>Fathometer</i>	<i>Depth Datum</i>
1402	11 $\frac{3}{4}$	less than 10
1405	8 $\frac{3}{4}$	6 $\frac{1}{4}$ - 6 $\frac{1}{2}$
1406	6 $\frac{1}{4}$	5 $\frac{1}{2}$

6. At Tr. 1099-1100, the witness was asked by the Court "whether it would be possible" for the CROCKER to have struck the 3.5 rock. His testimony was as follows:

"THE WITNESS: Sir, I only have one sounding, and that is eight and three-quarters, that I could use in determining the position, assuming that the three and one-half, at the six and one-quarter when he turned hard left, and that eight and three-quarters would be in agreement with the soundings on the hydrographic survey.

"THE COURT: So on the soundings—

"THE WITNESS: You have only one sounding to judge it by.

"THE COURT: I see.

"THE WITNESS: That is all. That one sounding would be in agreement between the six and one-quarter on the top of the rock of three and one-half fathoms."

7. At Tr. 1101, Government counsel inquired into the comparison at 1.6 miles off Smith Island Light. The witness stated:

"... at 1.6 miles we have two soundings that agree fairly well with the hydrography."

He later modified this to say that three of the five readings (including one post-impact reading based

on the witness' assumption of the CROCKER'S course change following her hard left rudder at 1406) were fairly consistent with the depth datum (Tr. 1105-6).

8. At Tr. 1108, the witness compared the fathometer readings with the depth datum, assuming a starting position of 1.8 miles off Smith Island Light with the following results:

<i>Time</i>	<i>Fathometer</i>	<i>Depth Datum</i>
1405	8 $\frac{3}{4}$	8-10 $\frac{1}{2}$
1406	6 $\frac{1}{4}$	9 $\frac{1}{2}$ -10
1407	9 $\frac{3}{4}$	12
1408	11 $\frac{3}{4}$	16

In response to the Court's question "So that isn't too inconsistent?", the witness replied "No, sir." (Tr. 1108).

The District Court's use of this testimony as a basis for its finding that the CROCKER struck a rock entirely outside the area of intensive investigation and wire-drag studies made by the Government following the ISLAND MAIL casualty must be viewed in the following light:

1. The 1.6 mile distance off used by the witness, and testified to by him as being "fairly consistent" with the depth datum was predicated on Conway's hearsay testimony as to the information obtained from other persons. Such testimony was admitted "whether true or not" solely to show "what information was available to the government" (Tr. 1023). Moreover, Conway had erred in his plotting—there was no evidence before the Court, hearsay or otherwise, which would place the CROCKER less than 1.75 miles off at 1402.

2. The hydrographic surveys were a slender reed to bear the burden attempted to be placed upon them. They are nothing more nor less than recordings of fathometer readings made on parallel tracks spaced approximately 100 meters apart (FF 16, Tr. 150). They record and chart the depths on the parallel tracks—they do not record or chart the depths between the tracks. The soundings recorded were not made by a vessel following the course of the CROCKER. Certainly some, and probably all, of the CROCKER soundings were made in the interstices between the hydrographic survey soundings.

3. The witness, in constructing the overlay (Ex. 138) which he used as a basis for his comparison, attempted to trace the track and speed of the CROCKER prior to impact as well as possible from the information available to him in Ex. 14 (Tr. 998), but there was no reliable information available to him to lay out the course of the vessel after the hard left rudder, at 1406, followed by the impact and the roll to port. The post-impact soundings are obviously meaningless in view of the wholly arbitrary course line laid out for the 1407 and 1408 readings.

4. There was no testimony whatever tending in any way to indicate either that the witness was qualified to undertake to position the CROCKER on the basis of the datum available to him, or that the method which he employed was a recognized and sufficiently reliable method of doing so. In fact there was no testimony that the method used had ever been used before.

5. The witness did not testify that in his opinion the datum submitted to him established that the CROCKER was approximately 1.6 miles or less off

Smith Island Light. Rather, he testified that the fathometer readings of the CROCKER were "fairly consistent" with such a distance, but also that they were not "too inconsistent" with a distance of 1.8. No one contended at trial, and no one contends now, that the distance off was 2.2 miles, which his testimony tended to eliminate as a possibility.

6. Government Negligence Following the CROCKER Casualty.

Following the CROCKER casualty of June 18, 1952, her Master initiated four reports to the Government.

The first, a radio message to the ship operator's Seattle office, was relayed by it to the Coast Guard, both verbally and in writing on June 19, 1952. It appears verbatim in the Pretrial Order at Tr. 25, and indicated, in substance, that the CROCKER had hit an obstruction at a distance of two miles from Smith Island Light, bearing 281° T, and that it was believed to be sunken wreckage.

On June 19, 1952 a radio notice to Mariners was issued by the Coast Guard, reporting that the CROCKER had "struck obstruction two miles 281° T from Smith Island Light." (Tr. 26).

The position of the obstruction reported by the CROCKER in its first report (and all subsequent reports) was approximately 800 feet west of the now established location of the 3.5 rock (See Ex. 79A).

Also on June 19, 1952, at the request of the Seattle office of the Coast Guard, the USCG Patrol Boat 83484, conducted a 90-minute sonar and visual search for the reported wreckage. Although the reported position of striking was northwest of

Smith Island Light (*i.e.*, 281° True), the vessel's log indicates that the search area was two miles SW of Smith Island (PTO, Par. 17, CR 27). In response to a Request For Admission, the Government admitted the area of search was "Two miles *southwest* of Smith Island" (Tr. 716). At trial, the Chief Boatswain in charge of the 83-foot patrol craft at the time of the search some 12 years earlier was permitted to testify, over objection, contrary to his log, the only contemporaneous written record, and to the Government's Admission, that the area of search was "about, oh, 1.5 miles to 2 miles to the westward of the island light . . ." (Tr. 718). The patrol boat had no fathometer (Tr. 720). It reported no contacts or results at all (Tr. 724).

No other search or investigation to determine the character, location, depth or height of the obstruction struck by the CROCKER was conducted by the Government until after the ISLAND MAIL casualty (PTO, Par. 17, CR 17; FF 32, Tr. 155A).

On June 27, 1952, there was filed with the Coast Guard at Seattle the CROCKER's Report of Marine Casualty, prepared by Captain Flint on June 19, 1952 (Ex. 11, CR 85) reporting that the vessel had "apparently scraped over wreckage or other uncharted danger" at a position two miles, 281° T from Smith Island Light. A duplicate report was filed by Captain Flint with the Coast Guard at Portland, Oregon, on July 7, 1952 (Ex. 12, PTO, Par. 16 e, CR 26). In the space provided for "Recommendations for Corrective Safety Measures", Captain Flint stated as follows:

"In view of the fact that all ships bound to or from Rosario Strait, Anacortes, Bellingham or Blaine must now pass West of Smith Island

since the regular channel to the East of it is now closed by the navy the waters West of Smith Island should be thoroughly examined and this uncharted danger located and buoyed as a protection to shipping." (CR 86—Item 33).

His recommendation for location of this uncharted danger was repeated in a narrative letter report from Captain Flint to the Coast Guard, Portland, dated July 7, 1952 (Ex. 14), which is printed in the record at 87-88, and as Appendix 2 to this brief. In Ex. 14, Captain Flint states that the object was "either submerged wreckage, possibly a sunken target from the nearby Naval Operations Area, or a pinnacle rock." He also added to previous reports a fix obtained one minute before striking, *viz.*, Iceberg Point Light dead ahead on a course of 360° T, with Smith Island Light abeam, or a bearing of 90° T. This fix is plotted in Appendix 4 to this brief as "Fix 2—1405 position." The narrative report also set forth five fathometer readings taken during the 6-minute interval commencing four minutes prior to the impact.

The CROCKER was drydocked for inspection and repair of her damage (at a cost of \$60,000.00) at Portland from July 12 to 21, 1952 (FF 33, CR 155A). While drydocked, its bottom was inspected, and in the presence of a Coast Guard officer, a piece of broken rock was removed from the damaged area of the vessel "from which the inference could easily be drawn that the vessel struck a rock rather than submerged wreckage" (FF 37, CR 157).

Commander Conway conducted an investigation into the CROCKER casualty, which included interviewing and taking the testimony of the CROCK-

ER's mate and helmsman (Tr. 1017, 1022, 1208). These men were not called as witnesses at the ISLAND MAIL trial, and, of course, were never subject to cross-examination on behalf of Private Cargo (or any other party to these actions). Conway's testimony as to the information he obtained from them was offered and admitted "only and solely for the purpose of determining what information was available to the government . . . Whether true or not." (Tr. 1022-23).

Commander Conway's determination was that the CROCKER sustained its casualty inside the 10-fathom curve, but he could not determine where (Tr. 1054). It could have been in the outermost kelp area (Tr. 1055), although he admitted that all witnesses questioned by him testified they saw no kelp (Tr. 1081).

Commander Conway had received a copy of the Notice to Mariners reporting the striking of an obstruction at two miles, 281° T from Smith Island Light (Tr. 1058). Although he concluded that the CROCKER casualty had occurred somewhere inside the 10-fathom curve, and although a Coast Guard internal instruction required reporting to the Corps of Engineers or the Coast and Geodetic Survey "if something isn't right", he made no report to the Coast and Geodetic Survey (Tr. 1056-57). With reference to the "Wreckage Rep." which he knew had been a symbol placed on the charts by the Coast and Geodetic Survey, he took no action (this symbol is discussed at length below). Asked why, his testimony was:

"My determination was that this grounding was due to failure to take bearings. That is what I was to determine. The Coast and Geo-

detic Survey, I don't know whether or not they ever had—whether he hit a wreck or a submerged object, or what he hit. I just let it sit there. There was nothing I could do about it; it was reported. It is advisory, and that was my contention there still may be a wreck there; I don't know." (Conway, Tr. 1061-2).

In addition to the radio Notice broadcast to Mariners on June 19, 1952 (CR 28), there was published by the U. S. Navy Hydrographic Office, on the same date, the following written notice, termed a "HYDROPAC".

"Sunken wreckage reported position $48^{\circ} 19'32''$ N, $122^{\circ} 53.40''$ W." (CR 28)

On July 5, 1952, a written Weekly Notice to Mariners, published by the Coast Guard and Hydrographic Office, stated as follows:

"Sunken wreckage has been reported in $48^{\circ} 19'32''$ N., $122^{\circ} 53'40''$ W. A danger circle with the note 'wreckage—rep. 1952' will be charted in the above position."

Both the HYDROPAC and the published Notice to Mariners gave inaccurate coordinates for the position of the obstruction reported by the CROCKER—placing the "sunken wreckage" over 700 feet (Wennermark, CG Tr. 898) northwest of Flint's reported position (See Ex. 79A). Even more importantly, neither gave any warning that the reported object was a danger to surface navigation or that it had been struck by a vessel having a mean draft of 21 feet 11 inches.

Thereafter, between July 14 and October 13, 1962 a symbol "Wreckage Rep. 1952" was placed on Coast and Geodetic Survey Charts of the Smith Island area, together with a small circle, tinted on some

charts, but not on others (Tr. 28). The circle was centered over 700 feet northwest of the CROCKER's reported position, conforming to the HYDROPAC and Notice to Mariners.

No other action was taken by the Government with respect to charts, notices or publications relating to the Smith Island area until after the ISLAND MAIL casualty and the investigation which followed.

The May 29, 1961 edition of the Coast Pilot, a publication of the Coast and Geodetic Survey, gave no notice of dangers in the area west of Smith Island, except as follows:

"A field of kelp extends about 1.5 miles westward of the island, with *a width of 1 mile and depths of 4½ to 5 fathoms*. A sunken rock, bare at lowest tides, is reported 0.3 mile westerly of the light." [Emphasis supplied] (CR 21).

On January 6, 1962, six months after the ISLAND MAIL casualty, the italicized language was changed, and additional language added as follows:

"... *width of about 1.5 miles over depths of 4 to 6 fathoms*; a rock covered by 3¾ fathoms lies about 1.8 miles eastward of the light. A rock that bares at lowest tides is about 0.3 mile westerly of the light. Strong currents set in and around the shoal area, especially on the flood, and deep-draft vessels should keep well outside the 10-fathom curve to avoid being set into danger." [Emphasis supplied] (CR 21).

The statement that the 3.5 rock is east of Smith Island was, of course, totally incorrect and this error was subsequently corrected in the Coast Pilot (CR 21-22).

The Government's witness, Edmonston, testified

that the only information received by the Nautical Chart Division of the Coast and Geodetic Survey relating to the CROCKER incident was the weekly Notice to Mariners (Tr. 963) which gave the position reported by the CROCKER incorrectly. The Coast and Geodetic Survey did not know that the reported obstruction had been struck by a vessel, or its draft, and made no inquiry (Tr. 964). The Government stipulated that the Coast and Geodetic Survey did nothing to verify or confirm the existence or nature of the obstruction for which it placed the "Wreckage Rep." legend on its charts (Tr. 965).

Edmonston's interpretation of the meaning of the charts, as to depths of water in the area of the legend, "Wreckage Rep.," was that there were twenty fathoms (Tr. 968-9).

His office did not place the symbol prescribed in Chart No. 1 (Ex. 16) under 0.17 indicating "foul ground" in the area west of Smith Island, inside the 10-fathom curve, because they had no information that it was foul ground (Tr. 974).

The "Wreckage Rep." legend was used, without any indication of depth, because his office had no information as to depth, as to the type of obstruction, or in fact that it had been struck by a surface-navigating vessel (Tr. 976). In contrast, after the ISLAND MAIL casualty, *but before discovery of the 3.5 rock*, the symbol under O (Oh), with depth of four fathoms, was placed on the charts to clearly indicate a danger to surface vessels of such draft (Tr. 976, Ex. 78).

Edmonston testified that had Captain Flint's narrative report (Ex. 14, Appendix 2) been received in his office, the information would have been taken up with the Navy Hydrographic Office, additional

notices to mariners would have been published, and the charts would have been revised (Tr. 982-84). The District Court found that Ex. 14 would have been of value to the Coast and Geodetic Survey, and that it could have determined the approximate position of the CROCKER casualty, had it obtained such information.

Aboard the ISLAND MAIL at the time of the casualty were current and corrected issues of the applicable United States Coast and Geodetic Survey Charts Nos. 6380, 6450 and 6300 covering the casualty area, prepared by the United States (FF 8, CR 147) and required by regulations to be carried aboard (46 C.F.R. 97.05-5). The responsibilities and functions of the Coast Guard and Coast and Geodetic Survey with respect to charts and assistance to navigation and navigators are specified in Title 14, U.S.C. §§ 2, 81 and Title 33 U.S.C. § 883a, respectively. The applicable portions of these statutes are set out in Appendix 1.

With respect to such charts, then, in summary, the following appears:

(1) The legend "Wreckage Rep.—1952" is shown on *all* such charts over 700 feet northwest of the position given in the report on which the legend was based (Wennermark, CG Tr. 898);

(2) The wording of the legend gave no notice to users of the chart that a vessel having a maximum draft of 24'2" (the after draft of the CROCKER had struck an obstruction in the vicinity, or that there was any known danger to surface navigation by vessels having a maximum draft of 29'2" such as the ISLAND MAIL. The least depth of available water was not shown, and the soundings given for

the immediate area were affirmatively misleading. The Government official in charge of their preparation interpreted them to indicate twenty fathoms of water in that area. The Coast and Geodetic Survey had no information that a surface vessel had struck the reported object.

(3) The Government failed to use symbols designated by it (in Ex. 16) to indicate that the position of the reported object was doubtful or unverified, although the Government's own personnel were uncertain of its existence and location. (Position approximate; position doubtful—See Ex. 16).

(4) A cursory Government search following its receipt of the report of the striking was directed to an area southwest of Smith Island, although the report made gave the locations as "2 Miles, 281° T" (or north of west).

(5) Although the Government knew in 1952 that the CROCKER, having a deep draft of 24'2" had struck a rock, no appropriate information was ever placed on the charts, and the earlier entry of "Wreckage Rep.—1952" was never deleted or corrected until after the ISLAND MAIL casualty.

(6) Although the Government received, in the course of its investigation of the CROCKER casualty, information on the basis of which according to its own witnesses, changes to the charts which were aboard the ISLAND MAIL would have been made, and further hydrographic or area drag studies might have been conducted in 1952, such information was never acted upon.

III SPECIFICATION OF ERRORS

1. The District Court erred in finding that in 1952 the SS CHARLES CROCKER struck an object

in the area of 1.6 miles west of Smith Island Light. (FF 38, CR 158).

2. The District Court erred in failing to find that the CHARLES CROCKER struck the same rock as the ISLAND MAIL, or an object in such proximity with such rock that a reasonable search for the location of the object reported by the CROCKER would have disclosed the existence and location of the 3.5 Rock.

3. The District Court erred in failing to find that the Government, through the United States Coast Guard, knew that the object struck by the CHARLES CROCKER on June 18, 1952, was a rock dangerous to surface navigation, and particularly to commercial vessels engaged in voyages between Puget Sound and Bellingham, Washington, and other places.

4. The District Court erred in failing to find that "the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east."

5. The District Court erred in finding and concluding that negligence of the United States was not the proximate cause or a contributing proximate cause of the striking of the ISLAND MAIL, and in failing to find and conclude that such negligence was a proximate cause of such striking and resultant damage and expense. (FF 39, CR 158; Conclusion 2, CR 160).

6. The District Court erred in failing to find that the 90-minute sonar and visual search performed by U.S.C.G. Patrol Boat 83484 on June 19, 1952, was not a proper, adequate, non-negligent discharge of the Government's responsibility to endeavor to obtain reasonable information, upon receipt of reports

indicating the existence of dangers to surface navigation, on which to base its charts, notices, bulletins and other publications to mariners and vessels navigating said waters.

7. The District Court erred in failing to find that a reasonable search of the area of impact reported to the Coast Guard by the CROCKER would have disclosed the existence and location of the 3.5 Rock and that failure to make such a reasonable search was negligence, which negligence was the proximate cause of the striking of the ISLAND MAIL and loss and damage to her cargo.

8. The District Court erred in finding that the search made by the United States Coast Guard in June 1952 as a result of the report received from the SS CHARLES CROCKER, covered an area generally west of Smith Island, instead of southwest as reported in the log of the vessel that conducted said search and as stipulated by the parties before trial. (FF 32, CR 155 A).

9. The District Court erred in failing to find and conclude that the United States had assumed the responsibility of providing information to mariners of the existence of dangers to surface navigation in heavily-traveled waters when such dangers are reported to it, and that having undertaken to provide notice or warning of such dangers it assumed the duty to do so in a proper manner.

10. The District Court erred in failing to find that Puget Sound pilots and navigators in such waters rely and are entitled to rely on information published and supplied in U. S. Coast and Geodetic Survey Charts and in the Coast Pilot in the navigation of vessels in waters including the waters westerly of Smith Island, and that Pilot Soriano so relied

in the navigation of the ISLAND MAIL.

11. The District Court erred in finding that the symbol "Wreckage Rep. 1952" placed on the published charts by the United States Coast and Geodetic Survey in 1952 was proper in view of the information then in the possession of the Government and in referring to said symbol as a danger circle. (FF 31, CR 155 A).

12. The District Court erred in failing to find that the legend "Wreckage Rep.—1952" placed on United States Coast and Geodetic Survey Charts westerly of Smith Island by the Government between 1952 and 1961 was inaccurate, affirmatively misleading, incomplete, and contrary to the actual knowledge of the United States, and that said legend and the location thereof induced reliance by mariners that there was a safe passage easterly of the location of said symbol.

13. The District Court erred in finding that the negligence of the Government in failing to publish to mariners through charts, notices or bulletins information concerning the striking of the CROCKER which it had obtained from the vessel's Master, its log and from Government inspection of the vessel's hull was the result of lack of a plan for coordination and dissemination of information amongst Government agencies. (FF 41, CR 159).

14. The District Court erred in failing to find that if the Government had properly charted and published the information furnished to it after the CHARLES CROCKER striking in June 1952, navigators and pilots, including Soriano who was piloting the ISLAND MAIL, would have been warned of dangers to surface navigation from underwater obstructions and would have avoided the area where

the ISLAND MAIL striking later took place. (FF 40, CR 158).

15. The District Court erred in finding that the striking of the ISLAND MAIL was caused solely by negligence of Pilot Soriano (contrary to its finding in *United States v. Soriano*). (FF 40, CR 158).

16. The District Court erred in finding that the 10-fathom curve was a definite warning of danger in the waters surrounding Smith Island and in further finding that it was negligence to navigate the ISLAND MAIL, having a mean draft of 26'7", on the outer limits of such curve at a time when there was a tide of plus 5.4 feet. (FF 15, CR 149).

17. The District Court erred in finding that Pilot Soriano failed to check the position of the ISLAND MAIL and in failing to find that the slight inaccuracy of the Kenyon calculator used by him for some bearings was corrected by the angle of the center window of the vessel's pilothouse when the evidence showed that such angle would correct rather than increase the slight inaccuracy of the calculator. (FF 11, 40, CR 148, 158).

18. The District Court erred in failing to find that, had information available to the Government been properly charted, the ISLAND MAIL would not have struck the 3.5 rock.

19. The District Court erred in entering a decree dismissing the libel herein and in failing to enter a decree that the appellee was liable in damages to the appellants.

IV

ARGUMENT

A. Argument on specifications one to five

The District Court erred in failing to find that the ISLAND MAIL had struck the 3.5 Rock, pushing it over from west to east, and that the CROCKER had struck the rock in its former position in 1952. These facts were established by a preponderance of the evidence. Its finding that the CROCKER struck a rock in the general area of 1.6 miles off Smith Island Light was clearly erroneous.

Private Cargo and the Government stipulated that the ISLAND MAIL struck the 3.5 rock. The evidence, reviewed at pages 12 to 19 of this Brief, establish that fact, independently of the stipulation. The rock is within approximately 1200 feet of the position of striking reported by the Master and Third Mate (Ex. 79A) and showed incontrovertible evidence of having been recently struck by a vessel. The pieces of steel plate found near the rock were of the same metallic composition as the plates of the ISLAND MAIL. No other recent striking in the area had been reported. An exhaustive search by the Government¹³ failed to reveal any other possible obstruction to account for the damage to the ISLAND MAIL.

The proof was equally compelling that at the time

13. The search was to determine "the exact position of a reported wreck which was charted about 2½ miles roughly off the west side of Smith Island to determine the least depth over the wreckage. Also to *extend the investigation sufficiently to locate any other uncharted obstruction.*" (CG Tr. 829-30) [Emphasis supplied].

it was struck by the ISLAND MAIL, the 3.5 rock was resting on a different face, and that its vertical dimension at that time was 25 feet rather than 18 feet.

It was a demonstrable physical impossibility for the ISLAND MAIL, stipulated and proven to have struck the 3.5 rock, to have done so with the rock in the posture in which it was found on July 13, 1961. So situated, there was a clearance of over 5 feet 7 inches between the rock and its point of impact on the vessel (See *supra* p. 17). Government efforts to close the gap consisted solely of testimony offered to show a maximum sinkage of 2'8", and the District Court found that even that amount of sinkage was not established (Tr. 349). In any event, the Government's testimony wholly failed to explain or suggest how the ISLAND MAIL could have struck the rock in its July 1961 position with a height of 18 feet—*i.e.* with its top 27'4" below the surface, and the District Court expressly found ". . . there is nothing in the evidence to account for this difference." (FF 43, Oral Opinion, Tr. 1136).

Other evidence was inconsistent with contact between the ISLAND MAIL and the rock in its July 1961 position. As positioned then, the evidence of contact with a vessel was on the rock's easterly face, whereas damage to the ISLAND MAIL was initiated on its easterly side (or starboard side, with the vessel proceeding generally north).

The District Court found that "the most probable possibility" was:

" . . . that the ISLAND MAIL struck the 3.5 Rock and pushed it over—from west to east and that the existing easterly portion of the top was formerly on the westerly side near the top.

In such a position the rock would be 25 feet in height—contact between the vessel and the rock would be possible and the areas of damage to the vessel would be consistent with the markings noted on the south side of the easterly portion of the top of the rock.” (FF 43, Oral Opinion, Tr. 1138).

The District Court found that:

“... there was nothing in the general area of the positions of impact estimated by Soriano, Smith and Gunderson which the vessel could have struck. In fact, the 3.5 Rock had the least depth of water over it of any object within a considerable area and was the only object revealed by the drag operations with which any part of the ISLAND MAIL could conceivably have made contact.” (FF 43, Oral Opinion, Tr. 1134).

Nevertheless, the District Court rejected Appellant's contention that the 3.5 rock had been struck and pushed over although it was “the most probable possibility” and “convincing and plausible” (FF 43, Oral Opinion, Tr. 1138, 1143). The District Court held that “there is no evidence that such happened, nor is there evidence which would support such an inference.” (FF 43, Oral Opinion, Tr. 1137). It held that such a finding would be “premised on speculation” (FF 43, Oral Opinion, Tr. 1137, 1143) and “not supported by the evidence.” (*Id.*, 1143).

What more is needed to establish that the rock was formerly in a posture such as to permit the vessel to strike it, and to leave marks on what is now the easterly side of the rock, and that the rock was overturned by the force of the impact? Only this: That no one observed and made measurements of this undiscovered rock prior to May 29, 1961, and,

of course, no one was in a position, beneath the surface of the water, to observe the impact.

It will be remembered, however, that Third Mate Gunderson described the action of the ISLAND MAIL as being "like we rolled something over" (CG Tr. 286-7), and that one Navy diver conceded that based on his inspection the rock could have been rolled over. (CG Tr. 1158-59, 1174).

Could the ISLAND MAIL have moved the rock? The question answers itself. This vessel displaced (*i.e.*, weighed) approximately 15,000 long tons and was moving at a speed of about 20 feet per second. A rock 25' x 20' x 18' contains 9,000 cubic feet. At the weight of solid lead (about 707 lbs. per cubic foot) the rock would have been less than 1/5 the weight of the vessel which struck it.

On this state of facts the District Court, although convinced as a practical matter that the rock had been overturned, felt constrained to stop short of so finding because it thought that these convincing circumstances gave rise to no more than "speculation".

Appellants respectfully suggest that the District Court's attempt to envision circumstances productive of the known state of facts (as by an unreported striking by some other deep draft vessel) without an overturning of the 3.5 rock is the only speculation with respect to this phase of the case.

In a very recent decision involving the striking of an underwater obstruction by a vessel, *Whorton v. T. A. Loving & Co.*, 344 F.2d 739, 742 (4th Cir. 1965), the Court of Appeals for the Fourth Circuit said:

"We are of the opinion that the evidence before the trial court was amply sufficient to create and support the inference that the Boots sank

as a result of striking a steel "I" beam, part of the fender system of the old bridge, which Loving was under an obligation to remove; in fact, such inference is, in our opinion, inescapable. Short of producing as a witness someone who participated in driving the beam into the bottom of the waterway during the construction of the old bridge and who could, by some means, identify that particular beam as the one that caused the damage, it is difficult to conceive what other proof Whorton could have produced. Direct evidence of a fact is not always required. Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence. *Michalic v. Cleveland Tankers, Inc.* 364 U.S. 325, 330, 81 S.Ct. 6, 5 L.Ed.2d 20 (1960). In *Williamson v. Williams*, 137 F.2d 298, 299 (4 Cir. 1943), this court said: "* * * inferences arising from admitted circumstances may sometimes be strong enough to outweigh the most positive and direct oral statements.' Fact finding does not require mathematical certainty. *Schultz v. Pennsylvania R. Co.*, 350 U.S. 523, 526, 76 S.Ct. 608, 100 L.Ed. 668 (1956)."

This statement is entirely in accord with the law as announced by the United States Supreme Court and this Court.

In *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960), at 330, the Court said:

"But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

This Court's remarks in *Fegles Const. Co. v. McLaughlin Const. Co.*, 205 F.2d 637 (9th Cir. 1953), are particularly applicable to the District Court's speculation concerning the possibility of an unre-

ported major marine disaster. The Court said at page 639:

"These findings are attacked on the ground that the evidence is insufficient as a matter of law to support them; that a substantial portion of the evidence relied upon is circumstantial and subject to the rule that if the conclusion reached from the facts in the chain of circumstances is equally consonant with the issues to be proven and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied, citing *Shaw v. New Year Gold Mines Co.*, 1937, 31 Mont. 138, 77 P. 515."

"This is a correct statement of the law, not only in Montana, but in most, if not all, jurisdictions. However, it does not alter the general rule that in civil cases a preponderance of the evidence is sufficient to establish the fact in issue. While the plaintiff must show that the inferences favorable to him are more reasonable or probable than those against him, the circumstantial evidence in civil cases need not arise to that degree of certainty which will exclude every other reasonable conclusion.

* * * *

"The evidence here not only supports the inference that the fire was caused by hot rivets, but it attains a greater degree of certainty than demanded by the rule, as it excludes every other *reasonable* hypothesis. The appellants suggest, as the cause of the fire, the possibility of arson, spontaneous combustion, a lighted cigarette or a discarded match. The short answer to that is that there is no evidence, direct or circumstantial, from which it could reasonably be inferred that the fire started from any of the suggested possibilities. As stated in the

memorandum opinion of the trial court, 'plaintiff is not required to conjure up mere possibilities or set up straw men just to knock them down'. We conclude that the findings are not clearly erroneous." [Footnotes omitted]

It is to be noted again that in the present case the District Court said that the "most probable" explanation of the ISLAND MAIL casualty was that the 3.5 rock had been pushed over by the impact. This is to be compared with the test of the *Schneider* case¹⁴ ("more likely than not") and in the *Fegles* case ("more reasonable or probable" than the contrary inferences).

Measured against these legal standards, the District Court's conviction that it was precluded from finding the existence of what it termed "the most probable possibility", because that would be "speculation" was clearly erroneous.

Likewise erroneous were the District Court's findings that the CROCKER did not strike the 3.5 rock, and that it struck a rock "in the general area" where the 4-fathom rock was found (Ex. 79A), *i.e.*, approximately 1.6 miles west of Smith Island Light and .27 miles east of the 3.5 rock (FF 38, CR 158). The Court specifically found that the CROCKER did not strike the 4-fathom rock (*Ibid.*).

The District Court based its findings on the fact of clearance between the CROCKER'S keel and the top of the 3.5 rock (as positioned in 1961) and on the interpretation it put upon the testimony of Mr. Edmonston (*Ibid.*).

If, as Private Cargo maintains, the evidence established that the ISLAND MAIL pushed over the 3.5 rock, and that prior to May 29, 1961, it was 25 feet

14. *Schneider v. Yakima County*, 65 Wn.2d 333, 397 P.2d 411 (1965), more fully discussed below.

high rather than 18 feet, the least depth of water over it at mean lower low water at the time of the CROCKER casualty was 15 feet rather than 22 feet, and at the then stage of the tide, namely plus 4.5 feet, the top of the rock was 19.5 feet below the surface, and would thus be contacted by a vessel having the CROCKER's mean draft of 21 feet 11 inches.

Appendix 5 illustrates the testimony as to the dimensions of the rock, its height in an upright position, the stages of the tide at the time of the ISLAND MAIL and CROCKER casualties, and the drafts of the two vessels at their respective points of impact with a rock. It demonstrates that appellant's position is consistent with all the known physical facts, and in conjunction with the other evidence, compels the conclusion that the CROCKER, as well as the ISLAND MAIL, struck the 3.5 rock which, on and before May 29, 1961, had a vertical height of 25 feet.

Preliminarily, it bears repeating that no other rock which could have been struck by either vessel has ever been found. There is literally no evidence whatever of the existence of any rock which the CROCKER could have struck at or near the position where the District Court found she did strike a rock.

Although the exhaustive search conducted by the Government following the ISLAND MAIL casualty was directed to determination of the location of the obstruction reported by the CROCKER, and was "to extend . . . sufficiently to locate any other uncharted obstruction" (CG Tr. 829-30) no obstructions other than the 3.5 rock and the 4-fathom rock (which was concededly not struck by the CROCKER) were found. The most recent edition of the Coast Pilot refers to no such rock (CR 22). The

most recent chart of the area in evidence (Ex. 67) indicates no such rock.

Proof that the CROCKER struck the 3.5 rock does not rest solely on the complete absence of any evidence of any kind as to the existence of any other possible rock. It was fairly established by the evidence before the District Court on the issue of her position at the time of the casualty.

All reports from the CROCKER to the Government, the initial radio message relayed to the Coast Guard (FF 26, CR 154), the two Reports of Marine Casualty (Ex. 11, 12) and the narrative report of Captain Flint (Ex. 14, Appendix 2), placed the casualty at 2 miles, 281° T from Smith Island Light, *i.e.*, .13 miles, or approximately 790 feet west of the 3.5 rock.

A position determined by cross-bearings taken by her Master one minute before collision (Ex. 14 and Appendix 2 to this Brief) placed her approximately 500 yards south and only about 180 feet west of the 3.5 rock (while proceeding in a gradual turn from 340° T towards a new course of 039° T).

Even the hearsay evidence of Conway as to the statements of other CROCKER personnel (not admitted to establish the position of the CROCKER, but only to show the information available to the Government) correctly plotted, places the CROCKER in the immediate vicinity of the only possible candidate for her striking, the 3.5 rock.

Conway testified that the Second Mate and Helmsman told him that at 1402 hours the CROCKER was on course 340° T, with Cattle Point Light dead ahead, and Smith Island Light abeam. When he plotted that position, he laid off a course of 339° T, as examination of Ex. 40A will plainly disclose.

Accurate plotting of the datum to which he testified would produce a distance off of approximately 1.75 miles. Indeed, Conway's own testimony established that the CROCKER was 1.7 or 1.75 miles off when abeam (Tr. 1050-51).

The 3.5 rock, at a distance of 1.87 miles off the Light, is precisely bracketed by the positions testified to by her Master, on the one hand, and by Conway, based on the Second Mate and Helmsman on the other.

Further, taking the 1402 position to which Conway said the Second Mate and Helmsman testified, and projecting the CROCKER's course of "Right Easy" keeping Smith Island Light abeam (Tr. 1037) takes the CROCKER through the dotted circle surrounding the 3.5 rock on current charts. (See Appendix 4 with the course line marked "Right Easy.")

A similar result follows from taking the 1402 position to which Conway testified, and projecting the "mean" course of the CROCKER at 355° T. (See Appendix 4). The evidence of the helmsman, according to Conway, was that he had been ordered to come right on a 5° right rudder, that his practice was to call out courses each time the vessel had come 10° from her previous course, and that he had called out two or three times before receiving the order "Hard Left" just before impact, *i.e.*, between 1402 and 1406 (Tr. 1073-5).

Edmonston's testimony that the fathometer readings of the CROCKER were "fairly consistent" with a distance off Smith Island Light of 1.6 miles is thus without any underlying support by way of evidence, much less substantial evidence, that the CROCKER was in such proximity to the Light. The Court's

“adoption” of his testimony,¹⁵ and its finding that the uncharted rock struck by the CROCKER was in that general area is thus unsupported by evidence and clearly erroneous.

It is perhaps worth noting that the Government, which employed both Conway and Edmonston (the latter prior to his retirement), presented both as its witnesses, and had access to all the information on which Edmonston’s testimony as the Court’s witness was predicated, did not see fit to offer such testimony.

To summarize, the contemporaneous reports of the CROCKER’s Master and his in-court testimony, which was subject to cross-examination, placed the CROCKER two miles off Smith Island Light at the time of the casualty. Conway’s testimony, as to the information obtained by the Government from the Second Mate and Helmsman, properly plotted, would place the CROCKER 1.75 miles distant from the Light. This evidence brackets the 3.5 rock, found to be 1.87 miles west of the Light, and each would have the vessel passing between 700 to 800 feet of the 3.5 Rock (one to the east, and one to the west). An exhaustive study by the Government, including wire-dragging, failed to disclose the existence of any other object which could have been struck by the CROCKER. The District Court’s finding that it struck some other rock, not shown to

15. Edmonston did *not* testify that he concluded the CROCKER was approximately 1.6 miles off the Light, but only that her fathometer readings were “fairly consistent” with such a distance. They were “not too inconsistent” with a distance off of 1.8 miles, the only other distance at which Edmonston was requested to make a comparison, apart from the 2.2 mile distance for which no one contended and to which no one testified.

exist, and its failure to find that it struck the 3.5 rock, were clearly erroneous.

“A finding is clearly erroneous when the reviewing court has a definite and firm conviction that it is a mistake, viewed in the light of all the evidence. This is so, even though there is some evidence to support the finding. *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954).”

Apex Mining Co. v. Chicago Copper & Chemical Co., 340 F.2d 985, 987 (8th Cir. 1965).

The District Court found the Government negligent, “perhaps grossly so”, in the publication of erroneous information and in its failure to correct such information. It found that the Coast and Geodetic Survey would “probably” have removed the symbol “Wreckage Rep.—1952”, and that, if it had been fully advised with respect to the information known by the Coast Guard it would have replaced it with a symbol identifying a rock or obstruction with a notation “Position Approximate” or “Position Doubtful” on the chart. (FF 43, Oral Opinion, Tr. 1143; FF 41, CR 159). But, since it found the CROCKER did not strike the 3.5 Rock, it held that such negligence was not a proximate cause of the ISLAND MAIL casualty (FF 43, Oral Opinion, Tr. 1145; FF 39, CR 157; Conclusion 2, CR 158).

There were, of course, proper, non-negligent courses of conduct open to the Government in 1952.

Those charged with the preparation of its charts could have been informed that a surface-navigating vessel had struck a rock, and they could have been informed of the draft of such vessel.

It was, of course, possible for the Government to have made just such a survey after the CROCKER striking, as it ultimately did after the second striking by the ISLAND MAIL (as Captain Flint recommended—Ex. 11, 12, 14). Such a survey would have located the 3.5 Rock (in its original position) and it is reasonable to conclude that it would have been charted (to fail to do so would, itself, have been gross negligence), and that it would have been given a “wide berth” by the ISLAND MAIL.

It could have foregone a survey, and merely charted the position, as reported to it (2 miles, 281° T from Smith Island Light) or in such position as it might have determined that the striking occurred, with the officially designated symbol code for “Position Approximate” or “Position Doubtful” and it clearly could have, and should have, indicated a least depth over such rock, of something substantially less than the 20 fathoms indicated on the charts which it prepared, and required the ISLAND MAIL to have on board at the moment of the striking.

Any of such courses of action would have resulted in elimination of the misleading “Wreckage Rep.” legend from the charts, and either accurate charting of the actual rock, or placement of a symbol indicating the approximate position of a danger to surface navigation by vessels having drafts of 20 or more feet, somewhere in the vicinity of the outer edge of the 10-fathom curve on the westerly side of Smith Island. This clearly would have sufficed to prevent the ISLAND MAIL casualty.

On the question of causation and proximate cause, the very recent case of *Schneider v. Yakima County*, 65 Wn.2d 333, 397 P.2d 411 (1965), is much in point.

This was a suit on behalf of passengers in an automobile injured when the car left the road on a sharp curve at high speed. Plaintiffs contended that the county's failure to place adequate warning signs warning of the curve was a proximate cause of the accident. At trial the jury returned a verdict for the plaintiffs.

Affirming, the Supreme Court of Washington said:

"From this testimony, it can also be inferred that the signs posted did not convey an adequate warning of the situation ahead and that had there been any signs to indicate the urgent necessity to reduce speed, this accident would have been averted.

This is far from conclusive proof of proximate cause, as must always be the case where the negligence relied upon is a failure to give adequate warning; but it clearly rises above speculation and conjecture to the level where reasonable minds can conclude that more likely than not adequate warnings would have prevented the accident which caused the injuries." (*Id.* at 415).

The court further pointed out that the fact that the driver's negligence may *also* have been a proximate cause of the accident would be no defense to the county, which was not entitled to have the driver's negligence imputed to the passengers.

Equally, in the present case, it is no defense to the Government, as respects the claim of Private Cargo, that Pilot Soriano may have been negligent—so long as reasonable men can fairly conclude that an adequate chart would more likely than not have prevented this accident.

B. Argument in support of specifications of error six through fourteen

Appellants have already set forth in this Brief the respects in which the Government was found to be negligent, "perhaps grossly so", by the District Court. The evidence further established that the Government was negligent in other respects, as to which the District Court made no specific finding. The District Court erroneously found that the "Wreckage Rep.—1952" legend placed on the charts in 1952 was proper in view of the information then in possession of the Government and erred in describing the circle placed in association with it as a danger circle.

It further erred in finding that the negligence of the Government was a failure "to formulate a plan for the coordination and dissemination of information." (FF 41, CR 159).

The authority and responsibility of the Coast Guard with respect to navigation, dangers thereto, and assistance to navigators, are prescribed by statute, Title 14, U.S.C. § 2, 81 (Extracted in Appendix 1). The authority and responsibility of the Coast and Geodetic Survey with respect to charts and navigational aids are prescribed in Title 33, U.S.C. § 883a (Appendix 1).

Aboard the ISLAND MAIL at the time of the casualty were current and corrected issues of the Charts Nos. 6380, 6450 and 6300, covering the casualty area, and published by the U. S. Coast and Geodetic Survey. The vessel was required by statute to have and maintain such charts 46 C.F.R. 97.05-1, -5 § 97.05-1, -5 (Appendix 1).

Under the statutes and regulations here in force, what duties were imposed on the two Government agencies most directly involved?

The following cases indicate the nature and scope of governmental duty and liability for negligence:

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), it was held that the Government would be liable if damage to a vessel and its cargo was caused by failure properly to maintain a light. The Court said:

“* * * it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his ‘good Samaritan’ task in a careful manner.” (*Id.* at 64).

In *Pioneer Steamship Co. v. United States*, 176 F.Supp. 140 (E.D.Wis. 1959), the Government was held liable for damage to plaintiff’s vessel caused by the Government’s action in withdrawing previously posted warnings of dangers to navigation and thus holding out that an area was safe, when in fact it was not, and in failing to act upon reports received from other vessels which put it on notice that unsafe conditions persisted. As noted by the Court in that case, the Government was not responsible, in the first place, for the existence of the hazardous condition.

In *Everitt v. United States*, 204 F.Supp. 20 (S.D. Tex 1962), the Government was held liable for damage to a vessel arising from the Government’s negligence in permitting a piling, part of a Government reference line, outside the channel, to remain in place after it was broken off below the water line.

Although, under the *Indian Towing* and other cited cases, the Government would be liable for negligent performance even as a volunteer, here the

Government is more. In the publication of information to mariners and the preparation of charts, it is performing Congressionally-authorized functions, and by requiring vessels to carry its charts, it invites, or more aptly, compels reliance on them. Private activity in the publication of nautical charts exists (*e.g.*, Ex. 105), but the Government has literally pre-empted the field by publication of its own charts, and the regulatory command that they be placed and maintained aboard ship.

In *The MARIA*, 91 F.2d 819 (4th Cir. 1937), the Court held that a vessel not provided with proper charts having current correction datum posted thereon was unseaworthy, and therefore liable to the owners of its cargo. Can the Government, which requires, as the sovereign, that vessels have and maintain Government-prepared charts, escape liability to cargo aboard a vessel being navigated in reliance on such charts negligently prepared? The cases indicate that it cannot.

Indian Towing and *Pioneer Steamship* were actions brought under the Federal Tort Claims Act. Private Cargo filed suits below under both the Tort Claims Act and the Suits in Admiralty Act, Title 46, U.S.C. §§ 741 *et seq.* (Extracted in Appendix 1). It is now clear that claims of the character here made are cognizable under the latter Act, as amended in 1960, and the District Court so held. (Conclusion 1, CR 160).

The Act provides in pertinent part:

“Such suits shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . .” (Title 46, U.S.C. § 743).

The waiver of immunity is complete, saving only

the reserved immunity from arrest of government property (*Id.*, § 741) and a limitation on the rate of interest which may be awarded (*Id.*, § 743).

The exceptions to the waiver of sovereign immunity provided by the Tort Claims Act are not repeated in the Suit in Admiralty Act. Thus, neither "agency discretion" nor "misrepresentation" affords a defense to the Government in this action, as might be the case under the Tort Claims Act. None of the provisions of the Tort Claims Act apply to claims "for which a remedy is provided by Sections 741-752 . . . of Title 46." (Title 28, U.S.C. § 2680(d)). In *United States v. Muniz*, 374 U. S. 150, 166 (1963), itself a Tort Claims Act case, the Court said:

"We should not, at the same time that State Courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Ravonier, Inc. v. United States*, supra, (352 U.S. at 320), 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If that Act is to be altered that is the function for the same body that adopted it'."

Under the Suits in Admiralty Act, Congress has not itself narrowed the remedy provided generally by any exception of "agency discretion," and it is therefore irrelevant to liability here whether the fault of the Government was "a fault of the Government to formulate a plan for the coordination and dissemination of information." (FF 41, Tr. 159). Nevertheless, as will be seen, the evidence established that the faults of the Government were multiple, gross, and actionable.

Although presented under the Tort Claims Act,

the *Indian Towing* and *Pioneer Steamship* cases indicate conduct of the Government in relation to aids or obstructions to navigation which has been held to constitute actionable negligence.

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Supreme Court defined the duty of the United States with respect to lighthouse service in the following passage:

“The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.” (*Id.* at 69).

Pioneer Steamship Company v. United States, 176 F.Supp. 140 (E.D. Wis., 1959), was brought to recover for damages sustained by plaintiff's ship as a result of striking a submerged object near a Coast Guard Station at Racine Harbor on Lake Michigan, Wisconsin. At one time the area had been buoyed as a danger to navigation, but after dredging in conjunction with maintenance of the channel, the buoys marking the danger areas were removed and notice was issued by the Government in its official publications that the depth had been restored. Three vessels, thereafter, reported to the Coast Guard that they had “rubbed bottom.” On the

basis of these reports, the Coast Guard made additional soundings and sweeping operations, but found no obstruction. Subsequently, plaintiff's ship ran heavily upon an obstruction. Following the casualty, the Coast Guard issued warnings to mariners to avoid the area until it could be cleared. Further sweepings and soundings were undertaken in the area and a number of objects, including stones and rock debris, channel iron and slabs of reinforced concrete were found. The court stated at pages 146 and 147:

"While defendant did not create the hazardous condition by its own act, it undertook by acts of its agents and its contractors, performing nondelegable duties, to issue warnings in respect thereto and to effect its removal. Thereafter, defendant held out to mariners, including plaintiff, by its official publications and by rescinding its previously posted warnings in the area that the waters in the vicinity of the Coast Guard dock were free of illegal obstruction and navigable subject to stated depths.

"Defendant failed to exercise due care in the performance of these acts. Defendant knew, or in the exercise of ordinary care should have known, that the removal of part of the debris by the Great Lakes Dredge & Dock Company did not clear the area in the vicinity of its dock of all debris. Subsequent sweepings and soundings revealed the continued presence thereof.

* * *

"When defendant received further notice of possible obstructions due to the debris remaining from the collapse of the Coast Guard dock in the area west of the slip by the information that vessels had rubbed bottom in that area which defendant held out to be navigable subject only to stated depths, it was put on inquiry

notice whether or not it had failed in its previously assumed duties of removal, inspection, and warning. Thereafter, defendant did not do all things reasonable to assure that its holding out of navigability of the area, based on its attempted removal and rescinding of warning, did not constitute a trap to mariners. Defendant failed to exercise reasonable care when it did not ascertain the location of this possible hazard with any degree of certitude by further inquiry of the vessels in question and when it did not employ appropriate means to determine the potential existence thereof. See *Eastern Transp. Co. v. United States*, (D.C.E.D.Va.1928) 29 F.2d 588, affirmed *The Snug Harbor*, 4 Cir., 1930, 40 F.2d 27.

Measured against these standards, the Government was actionably negligent in the following respects in addition to those specifically found by the District Court:

1. *Search* (Specifications 6-8). Whether the Government had a statutory duty to search or did so as a mere volunteer, it undertook to do so and was thus obligated to conduct a proper and adequate search. Instead, it diverted, from another mission for a cursory 90-minute "exploration," a patrol boat not even equipped with a fathometer, and, if the vessel's log and the Government's Admission are binding on it, as we submit, (or entitled to credit in opposition to the recollection of its Boatswain twelve years after the event), its search was not even directed to the area where the CROCKER casualty had been reported. It is hardly surprising, therefore, that the results of the search were negative, although the 3.5 rock existed at a distance of only 790 feet west of the position reported by the CROCKER and was found when a proper search

was made in 1961. In this connection, *United States v. Gavagan*, 280 F.2d 319 (5th Cir., 1960) *cert. den.* 364 U.S. 933 (1961) is in point. There the Government was held liable, under the Tort Claims Act, for negligent conduct of Search and Rescue activities, since it had undertaken to perform them.

2. *The Government Induced Reliance on its Charts and They Were Affirmatively Misleading* (Specifications 9-12). No later than when pieces of rock were taken from the damaged hull of the CHARLES CROCKER, in the presence of a Coast Guard officer, between July 12 and 21, 1952, the Government, through the Coast Guard, knew that:

1. An uncharted rock existed in the waters west of Smith Island, in an area traveled by ships bound from Puget Sound for northern Washington, British Columbia and Alaska ports, or return.

2. The rock had been struck by, and had caused extensive damage to a vessel having a mean draft of 21 feet 11 inches.

3. Her Master reported the point of impact as two miles, 281° T from Smith Island Light—a point just outside the 10-fathom curve, but also reported fathometer readings indicating the vessel was inside the 10-fathom curve.

Promptly on receipt of telephone information that the CROCKER had struck an obstruction, the Coast Guard broadcast a radio Notice to Mariners which so informed them, and correctly stated the reported position (FF 29, Tr. 155). On July 5, 1952, however, the Government published its written Weekly Notice to Mariners, which did not inform the recipients that the reported object had been struck by a vessel, much less of the draft of such

vessel, and contained inaccurate coordinates for the position which had been reported to it.

Thereafter, the Coast and Geodetic Survey, which did not know the object described in the Weekly Notice had been struck by a vessel, or the draft of such vessel, and made no inquiries of any kind, endorsed the notation "Wreckage Rep.-1952" near a circle not centered at the position given by the vessel which had originated the report. The Chief of the Branch in charge of preparation of the charts, interpreted them, as so revised, to indicate a depth of 20 fathoms (120 feet) of water over the object.

The Government was chargeable in July, 1952 with knowledge that the object was a rock having not more than 17 feet 5 inches of water over its top at mean lower low water [MLLW], and although admittedly uncertain of the position of the object struck by the CROCKER, believed it to be inside the 10-fathom curve. Nevertheless, it published to mariners charts indicating Wreckage outside the 10-fathom curve at a point which was not that reported to it by the striking vessel. It did not use any of the numerous symbols prescribed in its own publication, Ex. 16, to indicate either a rock or wreckage or other obstruction which was known to be dangerous to surface navigation (0-5, 0-5a, 0-6a, 0-14, 0-15, 0-26 or 0-27) indicating instead that 20 fathoms of water were available in the area of the "Wreckage Rep." legend.

Further, it did not use its own prescribed abbreviations to indicate that the position given was approximate or doubtful (0-41, 0-42, Ex. 16).

Despite the Government's knowledge, neither the current charts of the area aboard the ISLAND

MAIL, nor the Coast Pilot, gave any indication of danger to surface navigation by a vessel having a deepest draft of 29 feet 2 inches, so long as it maintained a distance of not less than 1½ miles westerly of Smith Island Light.

3. *Government Negligence was not solely the result of lack of a plan for the coordination and dissemination of information amongst Government agencies.*

Commander Conway testified that an internal Coast Guard instruction required him to report to the Coast and Geodetic Survey, "if something isn't right." He knew the CROCKER had struck a rock. He knew of the published Notice to Mariners which referred to wreckage, but gave no notice that it had been struck by a surface vessel and gave a position which was outside the area in which he thought the casualty had occurred. Yet, he testified that: "I just let it sit there . . . there still may be a wreck there; I don't know." (Tr. 1062).

While failure "to formulate a plan for the coordination and dissemination of information," if a negligent failure, would be actionable under the Suits in Admiralty Act (if not the Tort Claims Act), other personal faults appear. For example, the Coast and Geodetic Survey never knew the depth of water over the object it charted as "Wreckage Rep.-1952," and never inquired. Its only knowledge came from the Weekly Notice which gave no information that a surface-navigating vessel had actually struck the object. We submit that the Weekly Notice was negligently prepared not only in stating a wrong position, but more importantly, in failing to set forth what was known to the Coast Guard, namely, that a surface vessel having a mean draft

of 21 feet 11 inches, had struck the object. We submit further that the Coast and Geodetic Survey was negligent in not making inquiry to determine whether additional information as to depth was available before placing the legend on the chart in a way which indicated that 20 fathoms of water was available.

C. Argument in support of specifications of error fifteen through eighteen

The District Court erred in finding that Pilot Soriano was negligent in his navigation of the ISLAND MAIL, and in finding that his negligence was the sole cause of the casualty.

If the Government was negligent in the respects specified by the District Court or in the other respects urged here, and such negligence was a proximate cause of the casualty and resultant damage to cargo, Private Cargo may recover from the Government, whether or not Pilot Soriano was also negligent. There is no basis for imputation of his negligence to the cargo interests, nor do we understand the Government to so contend. Thus, Soriano's negligence is irrelevant to this case, unless it were the sole proximate cause of the ISLAND MAIL casualty.

While the Government is critical of much of Soriano's navigation, and the District Court found him negligent "for the purpose of this case only" in failing "to check the position of the vessel and make an allowance for current" (FF 40, CR 158), such deficiencies, if established by the evidence, are material only if the ISLAND MAIL, at the time of the casualty, was, as a result of Soriano's negligence, in a position to which a prudent navigator

would not have taken her. Thus, the ultimate question, as to Soriano's negligence, is whether, in the light of information available to him on May 29, 1961, it was negligent to take the ISLAND MAIL over the position of the 3.5 rock, then unknown and uncharted.

The rock was 1.87 miles westerly of Smith Island Light (FF 17, CR 150), and 486.4 feet—about one ship length, inside the 10-fathom curve. The nearest soundings to the point of casualty were as follows (in fathoms, at MLLW): $6\frac{1}{4}$ (37' plus), $6\frac{1}{2}$ (39'), 14 (84') and 11 (66'). The tide was plus 5 feet 4 inches. The vessel's maximum draft was 29 feet 2 inches. The charts indicated sufficient water for a vessel of such draft on such a tide to within about 0.6 miles westerly of the Light, although kelp was indicated as extending 1.5 miles west of the Light. The ISLAND MAIL never entered the kelp area.

The District Court did not find, and we do not understand the Government to contend, that it is always and everywhere negligent to navigate a vessel, drawing 29 feet 2 inches, in less than 10 fathoms (60 feet) of water. Pilot Soriano testified to numerous experiences in which he had taken vessels (including Government vessels) inside the 10-fathom curve at various points in pilotage waters (Tr. 55). So did other witnesses, including two called by the Government (Tr. 145, 373).

Precisely, what did the Government's own charts indicate as to safety of navigation by the ISLAND MAIL over the position where the 3.5 rock was later found, and is now charted?

Of the four soundings appearing on the chart in closest proximity to the position of the rock, the shallowest, east and north of the rock, was $6\frac{1}{4}$

fathoms, or 37.5 feet, at MLLW. At the then plus 5.4 foot stage of tide, the depth of water indicated was then 42.9 feet (Ex. 79A). In the preparation of its charts, the Coast and Geodetic Survey selects for placing on the chart, the least depth of water shown by its surveys for that area (Tr. 951-2). "Soundings are selected to best indicate the character of the bottom being charted, but in all cases the shoalest soundings are selected for the,—as a warning to the navigator." (Wennermark, CG Tr. 872). The same Government's witness who so testified, further testified that it would be safe for a vessel drawing 30 feet to pass through an area wire-dragged to 30 feet, under smooth sea conditions, on a plus five foot stage of the tide (CG Tr. 918-19).

The sounding nearest to the 3.5 rock which indicated less than 35 feet of water on a plus 5.4 foot tide was the $4\frac{3}{4}$ fathom sounding, 0.8 miles east and slightly north of the 3.5 rock, inside the kelp symbols, which themselves were over 0.4 miles inshore from the 3.5 rock where the ISLAND MAIL struck.

Thus, the charts showed adequate depths, and an absence of other dangers, for a distance of at least 0.4 miles inshore of the track of the ISLAND MAIL.

In these circumstances the fact that the area inside the 10-fathom curve was tinted on the charts does not support or justify the finding that it was negligence for Pilot Soriano to navigate the ISLAND MAIL on the extreme outer edge of the area, 1.87 miles west of the Smith Island Light.

The Government's own Nautical Chart Manuals, an extract of which is in evidence as Exhibit 126 and

127, destroy any basis for a finding that the 10-fathom curve is recognized as a danger curve by the Government, or should have been recognized as such by Pilot Soriano.

Exhibit 126 states, at page 46:

"TINTS IN WATER AREAS.

A blue tint is shown in water areas on an increasing number of printed charts to the curve which is considered the danger curve for that particular area.

In general, the 6-foot curve shall be considered the danger curve for Intercoastal Waterway charts, the 12 or 18-foot curve for harbor charts, and the 30-foot [5-fathom] curve for coast and general charts."

Testifying with reference to the quoted statement, the Government's witness, Edmonston, conceded that the Government's manuals prescribed tinting to the 5-fathom curve on the charts in question (Tr. 943). He knew of no other definition or instruction issued by the Government with reference to tinting of charts (Tr. 942-43).

The Government's claim that tinting out to the 10-fathom curve constituted a warning of danger was, so far as appears, first made in this litigation. It had never disseminated information to that effect.

"Q Mr. Edmonston, did—or do you know of any instructions or any information disseminated by the government whatsoever which states that the tinting out to a ten-fathom curve on any chart constitutes or characterizes that as a danger curve?

A Specifically, no." (Tr. 944-45).

The testimony of another Government witness, Pilot Lindholm, in response to palpably leading questions by Government counsel, is illuminating.

"Q (By Mr. Fryer) Captain, on the charts as they existed and under conditions as they existed in 1961 are there any dangers that a pilot should be aware of to keep him outside the ten-fathom curve west of Smith Island?

A Well, there's really no known dangers. There was one circle outside the ten-fathom curve which was marked Wreckage Reported 1952.

* * *

Q What does the blue tint on the Chart 6450 for that area indicate to you?

A It indicates the ten-fathom area.

Q Does the blue tint indicate anything else to you?

MR. HOWARD: I object to that, your Honor. He has asked the question once and now he is leading his witness by asking for something else.

THE COURT: Overruled.

A The ten-fathom, I mean the blue area indicates a possible ten-fathom area." (Tr. 116-17).

Thus, the Government's first expert witness, boldly invited to say that the 10-fathom curve indicated a danger area, refused three times to so testify and stated instead: "Well, there's really no known dangers."

The District Court's finding was that the 10-fathom curve

"... in that particular area is a definite warning of danger." (FF 15, Tr. 149.)

It will at once be conceded that there were dangers shown on the chart well within the 10-fathom curve—the kelp area extending west 1.5 miles from the

Light, and insufficient water inside 0.5 miles west of the Light (Ex. 79A). But no danger to surface navigation by vessels of the ISLAND MAIL's draft was indicated on the charts (or in the Coast Pilot) further than 1.5 miles west of Smith Island Light, until after the ISLAND MAIL casualty, and the District Court's finding that it was negligence to navigate the ISLAND MAIL on a track 1.87 miles west of the Light, and 486.4 feet inside the outer edge of such area, is unsupported by substantial evidence.

The second Government expert witness on the subject of piloting testified as follows:

"Q What does the line, the ten-fathom curve itself, mean to you?

* * *

A Well, the ten-fathom curve means that the water inside of that towards the beach, it's ten fathoms there and as you go further in you get less water.

Q (By Mr. Jones) Now, what more does the blue tint mean to you?

A Well, the blue tint just calls your attention to the fact." (Tr. 273-4).

The District Court was also in error when, in Finding of Fact No. 11, it correctly found that the Kenyon calculator used by Pilot Soriano to take some of his bearings was inaccurate (because the bearing surface was "twenty or thirty thousandths" of an inch off the perpendicular), and that the center window of the pilot house, against which Soriano placed the calculator was off 1° from the perpendicular of the centerline of the vessel, but failed to recognize and find that these slight deviations from

the perpendicular corrected one another, thus producing substantial accuracy. Careful review of the testimony of Glen Warren, as to the grinding operation performed to correct the instrument, with the instrument itself (Ex. 43), discloses that, when pressed against the pilot house window, the slant of the bearing edge of the calculator would be counteracted by the slant of the window.

D. Argument on specification of errors eighteen and nineteen

The District Court erred in failing to find that, had information available to the Government been properly charted, the ISLAND MAIL would not have struck the 3.5 rock. It erred in entering its Decree dismissing the libel, and in failing to enter a Decree adjudging the Government liable to Appellants and directing a determination as to Appellant's damages.

The District Court's findings make it clear that its conclusory finding that the Government's negligence was not a proximate cause of the ISLAND MAIL casualty (FF 39, Conclusion 2; CR 158, 160) was, in the Court's view, compelled by its preceding finding that the CROCKER did not strike the 3.5 rock (FF 38, CR 157-8).

In its oral opinion, incorporated in the formal findings as FF 43 (CR 159) the Court stated (Tr. 1145):

"In view of the fact, however, that the Court has determined that the steamship CHARLES CROCKER did not strike the 3.5 Rock the Court must and does find that any negligence upon the part of the Government in connection with the CROCKER incident was not a proximate cause

of the damage to the ISLAND MAIL's cargo. Any other conclusion must rest on speculation." [Emphasis supplied]

Appellants have demonstrated, *supra*, that the evidence on that issue requires a finding that the CROCKER did in fact strike the 3.5 rock, and that evidence destroys the basis for the District Court's holding that Government negligence was not a proximate cause of the ISLAND MAIL casualty.

Thus, the issue is whether, if the Government's charts and publications had given proper notice of a danger to surface navigation, either at the precise location of the 3.5 rock, or on the outer perimeter of the 10-fathom curve west of Smith Island, the ISLAND MAIL would have struck the 3.5 rock.

There is, of course, no evidence, or permissible inference therefrom, that, had the rock itself been located and charted prior to the ISLAND MAIL casualty, the ISLAND MAIL would have struck it.

The obvious purpose of the placement of such a warning on the charts (and/or publication in the Coast Pilot) is to alert navigators to such dangers, so that they may keep clear of them. That is precisely why the post-ISLAND MAIL charts and the now current Coast Pilot give clear notice of the existence, location, and depth of the 3.5 rock. It would seem capricious for the Government to suggest that Pilot Soriano, Captain Smith and Mate Gunderson, all tested and licensed by the Government itself, would have navigated the ISLAND MAIL into collision with a charted rock.

Similarly, although a reasonable search in 1952 would have disclosed the existence, location and depth of the 3.5 rock (as it did in 1961) even if the

Government was not under a duty to conduct a reasonable search following the CROCKER casualty, it was, beyond possible dispute, under a duty to give a proper warning of danger based on the information which it did have—briefly:

- (1) that a vessel having a deepest draft of 24 feet 2 inches had struck a rock
- (2) at a position given by her Master as 2 miles, 281° T from Smith Island Light
- (3) but that its fathometer readings indicated a passage somewhat closer to the Light, and
- (4) proper plotting of information obtained by the Coast Guard from the CROCKER's helmsman and watch officer would place the casualty at about 1.75 miles off the Light.

Had such information been placed on the charts (and/or been set forth in the Coast Pilot) in one of the several ways prescribed by the Government itself in Ex. 16, with the notation "Position Approximate" or "Position Doubtful" anywhere within the area bracketed by the information as to the rock's location, would the ISLAND MAIL have come into contact with the rock?

It must be remembered that the 3.5 rock is 1.87 miles west of Smith Island Light—and thus 0.12 miles (or 729 feet) west of the CROCKER's track as indicated to the Coast Guard by her helmsman and mate, and .13 miles (or 790 feet) east of the CROCKER's track, as reported by her Master. Any reasonable positioning of a danger symbol to give the approximate position of the rock struck by the CROCKER would have been in the immediate area where the 3.5 rock was subsequently struck by the

ISLAND MAIL (and later charted precisely), and would have shown a depth of less than three fathoms over its top.

The testimony was that a prudent navigator would have given a "wide berth" to any such symbol.

Pilot Soriano testified that it was his practice, in piloting such vessels as the ISLAND MAIL west of Smith Island to navigate at a minimum of $\frac{1}{2}$ mile distance from any known or reported danger to surface navigation of vessels of such draft (Tr. 491-2). Objection was made by the Government, and sustained by the District Court, when Soriano was asked specifically how he would have shaped the course and track of the ISLAND MAIL, if one of the danger symbols prescribed by Ex. 16 had been placed on the chart, or a warning had been given in the Coast Pilot (Tr. 481-3).

Mate Gunderson testified that he would have called the Master if in doubt as to the safety of the vessel's position, (or if in immediate danger would have relieved the pilot himself) (CG Tr. 308). Gunderson, who was intermittently observing the vessel's charts in the chart room (CG Tr. 314), never had any doubt that the ISLAND MAIL was in safe water (CG Tr. 290, 308).

Captain Floyd Smith, a licensed Puget Sound pilot, testified, in answer to questions from Government counsel, that a reasonably prudent pilot would direct his vessel's course to pass such danger symbols at a distance of $\frac{1}{4}$ to $\frac{1}{2}$ mile, *and if the chart indicated "position approximate" or "position doubtful,"* he would pass at a greater distance. (Tr. 868-69).

There was no testimony whatever that a prudent pilot would have directed the course of his vessel

in such proximity to any danger symbol adequately representing the approximate position and depth of the rock struck by the CROCKER (based solely on what the Government knew in July, 1952) that the ISLAND MAIL could have struck the 3.5 rock in 1961.

As the Supreme Court of Washington recognized in *Schneider v. Yakima County*, 65 Wn.2d 333, 397 P.2d 411 (1965), where the negligence involved is failure to give an adequate warning, proof that no warning was given, or that it was inadequate justifies the inference that the accident would have been averted by a proper warning. Here the testimony is undisputed that the ISLAND MAIL would not have been navigated on a track 1.87 miles west of Smith Island Light, and the casualty would not have occurred, had adequate warning been given. The District Court erred in not finding and concluding that the Government's negligence was a proximate cause of the ISLAND MAIL casualty and resultant damage, and in not entering an Interlocutory Decree, with a reference for damages, in favor of Appellant-Libelants below.

V. CONCLUSION

The District Court characterized this consolidated litigation as "the Case of the Disappearing Rock" or "The Case of the Ship That Struck the Rock That Wasn't There" (Tr. 1129) and appellants respectfully submit that the decision below can be affirmed only if this Court can believe that rocks disappear, or that ships strike non-existent rocks, because that is, in final analysis, what the District Court held.

The District Court was led into such error, although it found Appellant's contention to be the "most probable possibility" (Tr. 1138), because it misconceived the force and function of circumstantial evidence in cases such as this in which, by their nature, direct eye-witness testimony of subsurface happenings is unavailable. Appellant's evidence was of that character described by the Court of Appeals for the Fourth Circuit in *Whorton v. Loving*, 344 F.2d 739, 742 (1965), as "amply sufficient to create and support the inference" of a subsurface happening, and here, as there, the inference is "inescapable."

Not only did the evidence establish Appellant's contention by a preponderance of the evidence, which is all that is required, (*Fegles v. McLaughlin*, 205 F.2d 637 (9th Cir. 1953)), but here, as in the *Fegles* case, it "excludes every other *reasonable hypothesis*."

The case should be remanded with directions to enter an Interlocutory Decree as to liability in favor of Appellants, and for further proceedings on the issue of damages.

VI. SUPPLEMENTAL STATEMENT OF THE CASE

Additional facts pertinent to Private Cargo's appeal against American Mail Line

Prior to departure of the ISLAND MAIL from Seattle on May 29, 1961, Private Cargo had delivered to appellee MAIL LINE, and there had been loaded aboard the vessel, goods and merchandise in good order and condition, for carriage to various ports in the Orient. Carriage of the cargo was subject to the familiar Carriage of Goods By Sea Act, Title 46 U.S.C. § 1300, *et seq.* and, subject thereto, to the

bills of lading, of which Ex. 94 is an example. Some of said cargo was damaged, and not delivered in the same good order and condition as when received (FF 17, Tr. 235).

All issues as to damages were reserved for later trial, and the proceedings below were directed only to liability (Docket No. 16733, Entry of Sept. 23, 1962, CR 5).

Prior to December 27, 1960, the ISLAND MAIL's fathometer had become inoperable. The fact that it was inoperable at the time of the vessel's departure from Seattle on May 29, 1961, was known to managing officials of American Mail Line, Ltd., as well as to officials of the U. S. Coast Guard and the Maritime Administration. An unrestricted Certificate of Inspection had been issued with knowledge that its fathometer had been disconnected (FF 9, Tr. 232).

However, in view of the District Court's finding that the 10-fathom curve was a definite warning of danger, Private Cargo maintains that in sending the ISLAND MAIL to sea with its fathometer inoperable, MAIL LINE failed to exercise due diligence to make the vessel seaworthy, that it was in fact unseaworthy by reason of the absence of a functioning fathometer, and that such unseaworthy condition was a proximate cause of the casualty, and resultant damage to Private Cargo.

The District Court found and concluded that the vessel was not unseaworthy because of the absence of a fathometer, and that its absence "had nothing to do" with the casualty (FF 8, Tr. 231) and that MAIL LINE had exercised due diligence to make the ISLAND MAIL seaworthy (FF 21, Tr. 236) (Conclusion 4, Tr. 237).

The Use and Function of a Fathometer.

The ISLAND MAIL was equipped with numerous navigational devices, including radar, but her fathometer (echo sounding device) was completely inoperative. This fact was known to her owners and operators, to the Government, but not to the shippers, consignees, owners or others concerned in the privately-owned cargo. Thus at the time of this incident the only means of determining the actual depth of water beneath the vessel's keel was by hand sounding with a lead line or through the use of her so-called mechanical sounding machine. Neither of these devices was capable of giving continuous readings of the depth of the water as the vessel proceeded at full speed. (See Exhibit 55, Bowditch, "Practical Navigator" § 618). See also, Knight's "Modern Seamanship" pp. 90-91, (13th Ed.).

A fathometer is usual and customary equipment aboard ocean-going vessels. It gives continuous readings of the depth of the water under the keel while the vessel is at full speed and these readings are presented both on a dial and on a graph on the bridge where they can be easily and continuously observed by the navigating personnel. As stated by Bowditch, most soundings are now made by means of a fathometer (echo sounder) (Ex. 55, § 618).

The District Court found that the 10-fathom curve in the region west of Smith Island was "a definite warning of danger" (FF 15, Tr. 149). The "act, neglect or default" of Pilot Soriano was in permitting a vessel of the draft of the ISLAND MAIL to penetrate that line, within which, presumably, all waters are less than 60 feet deep (FF 12, Tr. 233). Thus, in both Private Cargo's action

against the United States, and in its claims against Mail Line in the limitation proceeding, faced with the parties' stipulation that the ISLAND MAIL struck a rock (the "3.5 rock") just inside the 10-fathom curve, the District Court attributed the casualty to the pilot's negligence in taking her there. It was possible, of course, to determine the vessel's position with respect to Smith Island Light by radar, or by means of cross-bearings and to lay down that position on a chart and thus determine whether the vessel was within or without the 10-fathom curve as shown on the then existing charts. Even without taking into consideration the fact that the charts of the area as they existed in 1961 have since been shown to be less than perfect,¹⁶ it is manifest that these alternate methods of determining the vessel's position relative to the 10-fathom curve are inferior to a fathometer which provides automatic and continuous readings of the depth of water under the keel.

The trial of this case was largely concerned with the methods employed and which might have been employed to fix the positions of the ISLAND MAIL from time to time. The end goal of all such methods was to determine whether the ISLAND MAIL was in safe waters. There can be no doubt that the vessel's fathometer would have done this surely and accurately, had it been operative.

The ISLAND MAIL'S Chief Officer White testified that an adequate fathometer would have "picked up" the shoal to the westward of Smith Island, if it had been in use (CG Tr. 233).

16. For example, in charting the position of the object struck by the CROCKER, as reported to the Coast Guard the Coast and Geodetic Survey centered the symbol over 700 feet from the coordinates of the reported position.

Promptly upon his assignment to the ISLAND MAIL, the vessel's navigator, Mate Gunderson, observed that the fathometer was inoperable and made a request to have it repaired (Ex. 139, p. 327).

Captain Andreas Einmo, a licensed Puget Sound pilot, called as an expert witness by the Government (Tr. 351-2) testified not only that the fathometer would detect passage of a vessel over the 10-fathom curve, but (in response to a question by the Court) that he would use the fathometer as a check on the accuracy of his bearings to locate the position of the vessel (Tr. 365). Indeed, Captain Soriano himself testified to his use of the fathometer aboard another vessel to pick up the soundings when navigating across the 10-fathom curve in the Dallas Bank area, a few miles west of Smith Island.

Furthermore, Mr. Edmonston testified that one function of the depth curves appearing on charts published by the Coast and Geodetic Survey (with which the ISLAND MAIL was provided) was to afford navigators an additional feature with which to fix the position of the vessel, by use of the fathometer (Tr. 951).

The evidence establishes, without contradiction, that the fathometer would have shown that the vessel was penetrating the 10-fathom curve, which "in that particular area is a definite warning of danger" (FF 43, Oral Opinion, Tr. 1139). Thus the fathometer becomes crucial. A fathometer would not detect an isolated rock in time to avoid it, but it would easily, quickly and surely detect penetration of the 10-fathom curve.

Failure to maintain an operable navigational aid which, if available, would have instantaneously informed those charged with the navigation that the

vessel had entered waters that the District Court found to be dangerous, is clearly unseaworthiness.

The issue is not whether the fathometer would have detected the rock but whether it would have detected penetration of the 10-fathom curve, which it clearly would have done more quickly and efficiently than any of the other equipment on board.

VII

SPECIFICATION OF ERRORS

1. The District Court erred in finding that upon departure from Seattle on May 29, 1961, the ISLAND MAIL was in all respects seaworthy, and was not unseaworthy because of the condition of the fathometer, and in failing to find that the ISLAND MAIL was unseaworthy by reason of her inoperative fathometer. (FF 8, CR 231).

2. The District Court erred in finding and concluding that American Mail Line Ltd. exercised due diligence to make the ISLAND MAIL seaworthy and properly manned, equipped and supplied, and in concluding that her grounding, and resultant loss, damage and injury were done, occasioned or incurred without the privity or knowledge and without fault or liability of American Mail Line Ltd. (FF 21, CR 236).

3. The District Court erred in failing to find that if the fathometer on board the ISLAND MAIL had been operable and in use it would have given warning to the pilot and to the mate on watch, as well as to the vessel's other officers when the ISLAND MAIL crossed the 10-fathom curve, which, according to the District Court, was a definite warning of danger in the area around Smith Island.

4. The District Court erred in finding that the inoperable condition of the fathometer aboard the ISLAND MAIL had nothing to do with the striking of an uncharted rock within the 10-fathom curve, and in failing to find that an operable fathometer could have prevented the casualty. (FF 8, CR 231).

5. The District Court erred in failing to find that there was no proof that the fathometer aboard the ISLAND MAIL would not have been used by the vessel's officers if it had been operable and in finding that its use under conditions then existing was unnecessary. (FF 8, CR 231).

6. The District Court erred in finding that the vessel's striking of a rock inside the 10-fathom curve was occasioned by the pilot's failure to fix her position accurately with the means at hand and in failing to find that the inoperability of the fathometer, an instrument that would automatically and continuously give warning of penetration of the 10-fathom curve, rendered the ISLAND MAIL unseaworthy and contributed to the loss. (FF 12, CR 233).

7. The District Court erred in entering a decree dismissing the claims and causes of action of the cargo claimants-appellants herein and in failing to enter a decree that petitioner-appellee, American Mail Line Ltd. was liable in damages to appellants.

VIII. ARGUMENT

American Mail Line breached its statutory duty to exercise due diligence to make the carrying vessel seaworthy, and to properly equip her as required by Title 46, U.S.C. § 1303 (1). It offered no evidence to prove exercise of due diligence, the burden of doing

so being placed upon her, as carrier, by Title 46, U.S.C. § 1304 (1). Mail Line's managers had knowledge that the ISLAND MAIL'S fathometer was inoperable. No attempt to show due diligence was, or could have been made.

It is clear that the exceptions of error in navigation and peril of the seas afforded by Section 1304 (2) of the Carriage Of Goods By Sea Act and which the District Court found excused MAIL LINE in this case, are not available to the carrier if it has failed to prove that it exercised due diligence to provide a seaworthy vessel. *Schroeder Bros. v. The SATURNIA*, 123 F.Supp. 282 (S.D.N.Y. 1954), *aff'd*, 226 F.2d 147 (2d Cir., 1955). *General Motors Co. v. The OLANCHO*, 115 F.Supp. 107 (S.D.N.Y. 1953), *aff'd*, 220 F.2d 278 (2d Cir. 1955) (per curiam).

Indeed, if damage to cargo results in part from a cause for which the carrier is liable, and in part from an excepted cause, the carrier bears the entire loss, unless it can segregate. *Schnell v. The VALLESCURA*, 293 U.S. 296 (1934). To the carrier's statutory exemptions ". . . the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it." (*Id.* at 304).

Can it be said that a carrier knowingly sending its vessel to sea with an inoperable fathometer, has used due care to guard against what the District Court here found to be negligent penetration of the 10-fathom curve, a "definite warning of danger"?

And when the vessel strikes an uncharted obstruction within that "danger area" can the carrier be excused because proper use of other equipment

available aboard the vessel might have averted the casualty?

The District Court answered these questions in the affirmative.

We submit that the law is to the contrary.

From the evidence outlined above, it necessarily follows that the ISLAND MAIL'S transgression of the 10-fathom curve off Smith Island would have been detected by her fathometer had it been operative. Furthermore, it is clear that the information thus obtained and made available to the vessel's navigators should have constituted a warning of the vessel's entry into an area of imminent peril. However, being without an operative fathometer when she departed from Seattle, the ISLAND MAIL was deprived of the most accurate means of determining its position with relation to the 10-fathom curve, the penetration of which the District Court found to be negligence.

The failure to have a vessel's fathometer in operable condition renders it unseaworthy. *Indian Towing Company v. United States*, 182 F.Supp. 264 (E.D.La. 1959), *aff'd*, 276 F.2d 300 (5th Cir.), *cert. den'd*, 364 U.S. 821 (1960). In the *Indian Towing Company* case, the trial court held that the unseaworthiness of a tug, the NAVAJO, proximately caused the grounding of the barge it was towing. One of the factors upon which the tug's unseaworthiness was predicated was the inoperative condition of its fathometer, concerning which the court stated:

"With an inoperative fathometer, the Navajo could determine the depth of the water only by taking soundings with a hand lead line. These, to be accurate and reliable, must be taken, at dead slow speed, * * * " 182 F.Supp. 264, at 267.

So holding, the court held shipowner not entitled to recover for loss of cargo or vessel.

The holding in *Indian Towing Company* is consistent with the principle that a shipowner is obligated to adopt modern navigational equipment in order to maintain a seaworthy vessel. Thus, in *The T. J. Hooper*, 53 F.2d 107 (S.D.N.Y. 1931) the court stated:

“The standard of seaworthiness is not, however, dependent on statutory enactment, or condemned to inertia or rigidity, but changes ‘with advancing knowledge, experience, and the changed appliances of navigation.’ *The Titania* (D.C.) 19 F. 101, 106; *The Southwark*, 191 U.S. 1, 24 S.Ct. 1, 48 L.Ed. 65. It is particularly affected by new devices of demonstrated worth, which have become recognized as regular equipment by common usage.” (*Id.* at 111).

Upon the evidence here, if the ISLAND MAIL had not been equipped with an echo-sounding fathometer, the vessel would have been unseaworthy. More importantly, once the fathometer was installed on the vessel, it becomes even clearer that the Mail Line was obliged to keep that equipment in operating condition if the ISLAND MAIL were to remain seaworthy. This is the rule announced in *Indian Towing Company v. United States*, (*supra*). Furthermore, it does not differ from other cases holding that vessels going to sea with defective navigational equipment are unseaworthy. In *The MARIA*, 91 F.2d 819 (4th Cir., 1937), a vessel was found unseaworthy when she sailed with outdated navigational publications.

There the court said:

“Our view of the law, now that the point has been definitely raised, is that charts, light lists,

and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them. * * * The duty of an owner in this respect is nondelegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship. [Citations] * * *” (*Id.* at 824).

Similarly, a vessel was held to be unseaworthy, if, although equipped with a proper compass she should put to sea with that item of navigational equipment in a defective condition. *Greater New Orleans Expressway Commission v. The Tug Claribel*, 222 F.Supp. 521 (E.D.La. 1963), 1964 AMC 967; *OVERBROOK*, 1932 A.M.C. 719 (S.D.N.Y. 1931). We submit that the ISLAND MAIL upon departing Seattle with an inoperable fathometer was deprived of a useful navigational device, and that in such condition there can be no doubt that she was rendered unseaworthy.

IX. CONCLUSION

If the 10-fathom curve was “a definite warning of danger” in the area west of Smith Island, and its penetration was negligence, the absence of any means for ready determination of depths while the vessel was underway becomes a clear cause of the casualty and resultant damage, for which the carrier is liable.

In such event, the decree must be reversed, with

directions to enter a decree adjudging MAIL LINE liable for damage to Private Cargo, and for further proceedings on the issue of damages.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

MARTIN P. DETELS, JR.
Attorney for Appellants

Appendix 1—Statutes and Regulations

Appendix 2—Exhibit 14—Letter Report of Captain
Flint

Appendix 3—Plot of CROCKER positions per Flint

Appendix 4—Plot of CROCKER positions per
Conway

Appendix 5—Graphic Presentation—ISLAND
MAIL, CROCKER and 3.5 Rock

Appendix 6—Table of Exhibits

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APPENDIX 1

STATUTES AND REGULATIONS

United States Code

TITLE 14

§ 2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war. As amended Oct. 5, 1961, Pub.L. 87-396, § 1, 75 Stat. 827.

§ 81. Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

- (1) aids to maritime navigation required to serve

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the needs of the armed forces or of the commerce of the United States;

- (2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the Department of Defense; and
- (3) Loran stations (a) required to serve the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of the Federal Aviation Agency.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948. As amended Aug. 23, 1958, Pub.L. 85-726, Title XIV § 1404, 72 Stat. 808.

TITLE 28

§ 2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

* * *

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to

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claims or suits in admiralty against the United States.

TITLE 33

§ 883a. Surveys and other activities

To provide charts and related information for the safe navigation of marine and air commerce, and to provide basic data for engineering and scientific purposes and for other commercial and industrial needs, the Director of the Coast and Geodetic Survey, hereinafter referred to as the Director, under direction of the Secretary of Commerce, is authorized to conduct the following activities:

- (1) Hydrographic and topographic surveys;
- (2) Tide and current observations;
- (3) Geodetic-control surveys;
- (4) Field surveys for aeronautical charts;
- (5) Geomagnetic, seismological, gravity, and related geophysical measurements and investigations, and observations for the determination of variation in latitude and longitude. As amended Apr. 5, 1960, Pub.L. 86-409, 74 Stat. 16.

TITLE 46

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. . . . As amended Sept. 13, 1960, Pub.L. 86-770, § 3, 74 Stat. 912.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. . . . Mar. 9, 1920, c. 95 § 3, 41 Stat. 526.

TITLE 46

§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter. Apr. 16, 1936, c 229, 49 Stat. 1207.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title. Apr. 16, 1936, c 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship—Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception,

carriage, and preservation. . . . Apr. 16, 1936, c 229, § 3, 49 Stat. 1208.

**§ 1304. Rights and immunities of carrier and ship
—Unseaworthiness**

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; . . . (c) Perils, dangers, and accidents of the sea or other navigable waters; . . . Apr. 16, 1936, c 229, § 4, 49 Stat. 1210.

CODE OF FEDERAL REGULATIONS

**Subpart 97.05—Notice to Mariners and Aids to
Navigation**

§ 97.05-1. Duty of officers

(a) Licensed deck officers are required to ac-

quaint themselves with the latest information published by the Coast Guard and the United States Navy regarding aids to navigation. Neglect to do so is evidence of neglect of duty. It is desirable that vessels other than motorboats shall have available in the pilot house for convenient reference at all times a file of the applicable Notice to Mariners.

(1) Notice to Mariners, published weekly by the Coast Guard, contains announcements and information regarding aids to navigation and charts of waters of the United States and is available for free distribution at field offices of the Coast Guard, United States Coast and Geodetic Survey field stations, and the Marine Division, Custom House.

(2) Notice to Mariners, published weekly by the United States Navy for the correction of charts, sailing directions, light lists, and other publications, and which includes foreign waters and certain waters of the United States, is available for free distribution at the Hydrographic Office, Branch Hydrographic Offices, or any of the agencies of seaboard ports, and is also on file in the United States consulates where they may be inspected.

§ 97.05-5. Charts

(a) All vessels, except barges, vessels operating exclusively on rivers, and mortorboats other than those certificated for ocean and coastwise routes, shall have charts of the waters upon which they operate available for convenient reference at all times. (CGFR 55-28, 20 F. R. 4461, June 25, 1955).

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APPENDIX 2

COASTWISE LINE

CALIFORNIA - OREGON - WASHINGTON - ALASKA

150 SANSOME STREET
SAN FRANCISCO 4, CALIFORNIA

SS 'Charles Crocker'

July 7, 1952

Officer in Charge Marine Inspection
United States Coast Guard
Portland, Oregon.

Dear Sir:

In addition to original and two copies of form 2692 submitted herewith I am giving you the following report on striking an unknown obstruction with this vessel at 1406 Pacific Daylight Saving Time on June 18, 1952 while on a voyage from Seattle, Wash. to Seward and other Southwestern Alaska ports.

In proceeding North via Rosario Strait I passed to the Westward of Smith Island and to the Eastward of the Naval Operations Area located South and East of Hein Bank as this area is closed to shipping from 8 A.M. to 4 P.M. Pacific Standard Time. It is no longer possible to pass East of Smith Island as we formerly did due to this area being closed to shipping at all times by the U.S. Navy.

Smith Island Lighthouse was abeam at 1401 D.S.T. Although the logbook entry places vessel 2.2 miles off, cross bearing taken shortly after placed her an even two miles off. When the lighthouse was abeam I began hauling very slowly to the right, keeping the lighthouse abeam in order to preserve the original distance off until vessel came around to her next course of 39 degrees true. At the same time I had the second mate Mr. Burris start the Fathometer

and keep me informed on the soundings he obtained. The soundings registered by this machine are from the keel to the bottom and started at nine fathoms, shoaled to six, remaining at six until 1406 when it suddenly registered three and one half fathoms under the keel. As this was reported I ordered the wheel hard left but just as the man at the wheel had it hard over a heavy jar was felt, apparently on the starboard side abreast number four hatch, and vessel which was rather tender due to a large deckload took a roll to port. She did not lose headway. Engine was stopped at once. The fathometer then registered seven fathoms under the keel and at 1408 registered nine fathoms. Engine was then put slow ahead and two minutes later full ahead proceeding toward Rosario Strait, having Smith Island Lighthouse abeam the second time 2.2 miles off at 1416 on a course of 42 degrees true.

It was high water at Smith Island at 1602 D.S.T., height 5.5 feet. The height at 1406 was 4.5 feet. Vessel was drawing 19' 8" forward, 24' 02" aft, 21' 11" mean, or 21 feet at the Fathometer transmitting oscillator which is located just to starboard of the keel between frames 66 and 67. This gives the following chain of soundings reduced to Mean Lower Low Water which is the latest soundings shown on the chart.

Time	1402	1405	1406	1407	1406
	fath.	fath.	fath.	fath.	fath.
Fathometer registered	9	6	3½	7	9
Depth of oscillator (21') plus	3½	3½	3½	3½	3½
Actual depth of water	12½	9½	7	10½	12½
Height of tide at 1406 (4.5') ...	—¾	—¾	—¾	—¾	—¾
Sounding at mean lower low water	11¾	8¾	6½	9¾	11¾

Although no cross bearings were obtained at the

exact time of striking, a fix was obtained one minute before when Iceberg Point Light was right ahead on a bearing of 360 degrees true and Smith Island Lighthouse was abeam to starboard on a bearing of 90 degrees true.

Just what it was the the vessel struck I do not know. Whatever it may be it is of very small extent, either submerged wreckage, possibly a sunken target from the nearby Naval Operations Area, or a pinnacle rock. Undoubtedly a few feet one side or the other would have cleared it entirely.

In view of the fact we are not allowed to use the former route East of Smith Island as it closed to navigation by the Navy, all vessels bound to or from Rosario Strait, Anacortes, Bellingham and Blaine must of necessity run to the Westward of Smith Island. I have observed other vessels passing much closer than two miles off Smith Island, in fact I met a tug and barge bound South some fifteen minutes before striking that was about half a mile East of the vessel. The following notice to mariners was broadcast the next morning as the result of my radio report of the incident.

QUOTE:

JUNE 19, 1952

TTT MW U S COAST GUARD SEATTLE

INFORMATION TO ALL SHIPPING—NOTICE
TO MARINERS NUMBER R100-WASHINGTON
STRAIT OF JUAN DE FUCA SS CHARLES
CROCKER ADVISES STRUCK OBSTRUCTION
ON 18 JUNE IN POSITION 2 MILES 281 DE-

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GREES TRUE FROM SMITH ISLAND LIGHT.
REFER LIGHT LIST NUMBER 1757.

COMMANDER 13TH COAST GUARD DISTRICT
END OF QUOTE.

I am sure it would be greatly appreciated by all mariners if you could cause this area to be carefully examined and this uncharted danger located and buoyed for the protection of shipping.

Yours respectfully,

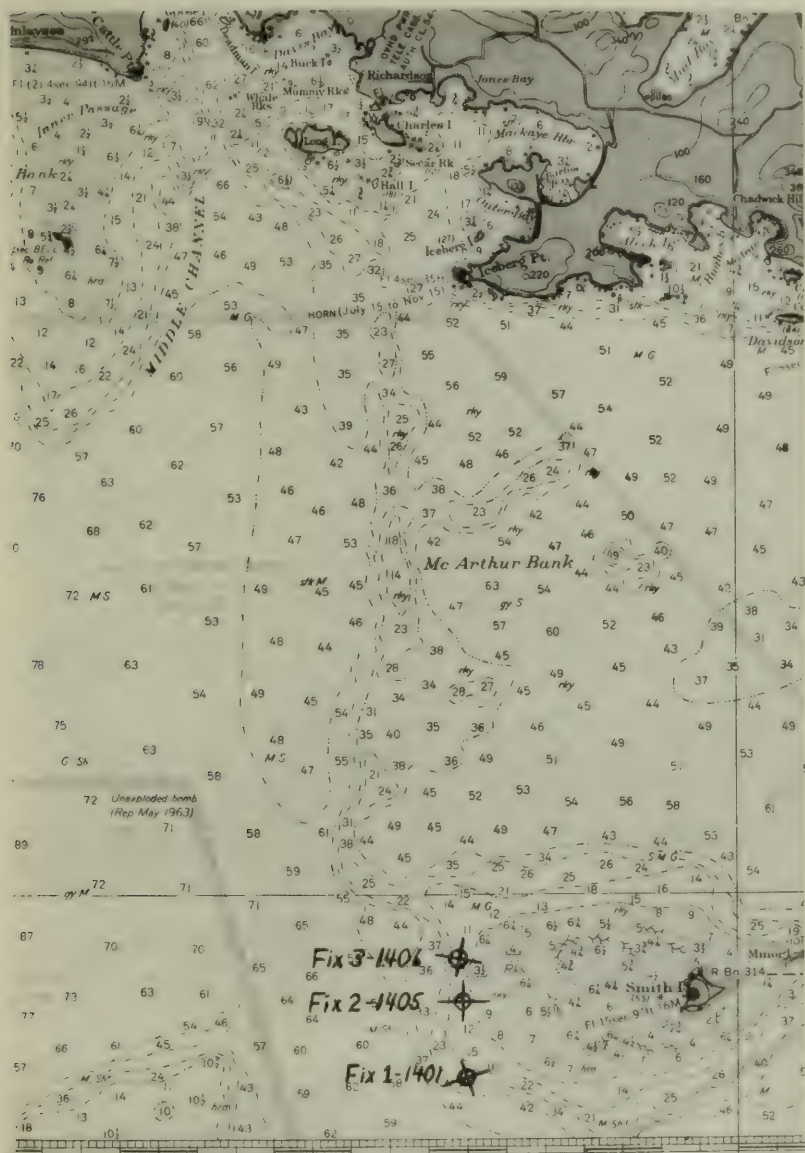
D. G. Flint

Master and Pilot, S.S. Charles Crocker

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APPENDIX 3

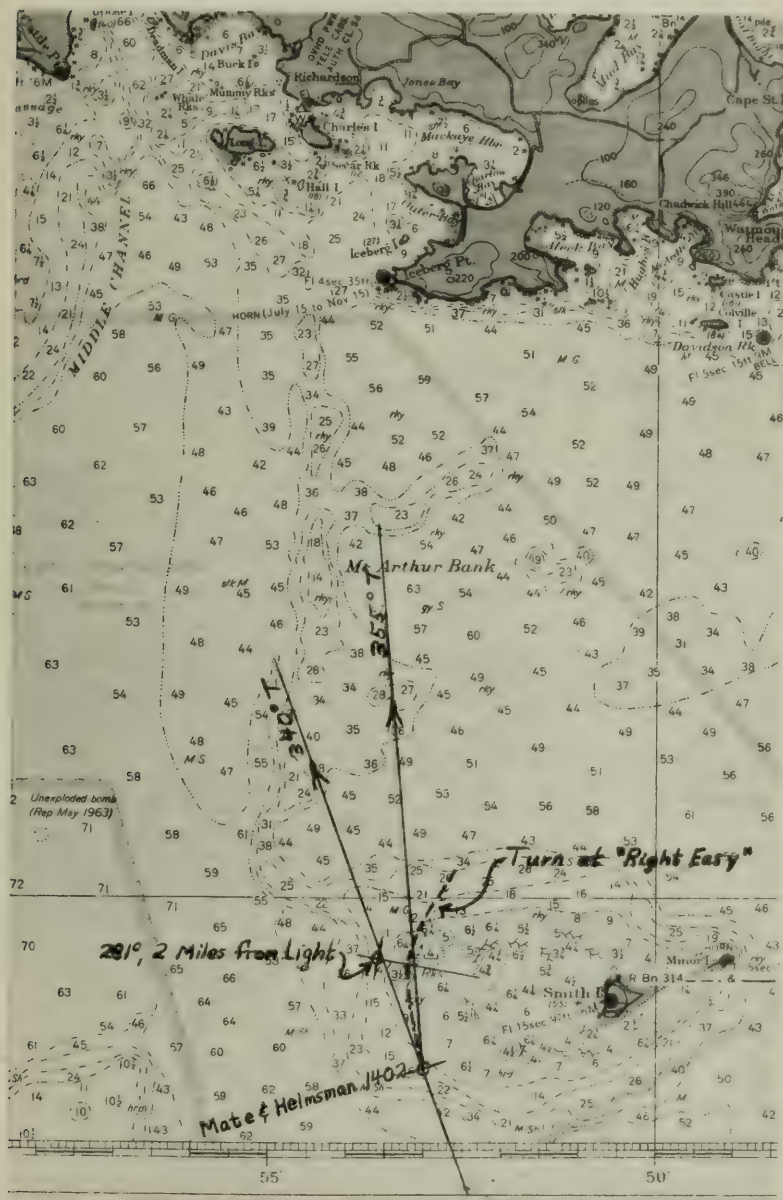
Plot of CROCKER Positions per Flint (Exerpt from U.S.C. & G.S. Chart 6380)



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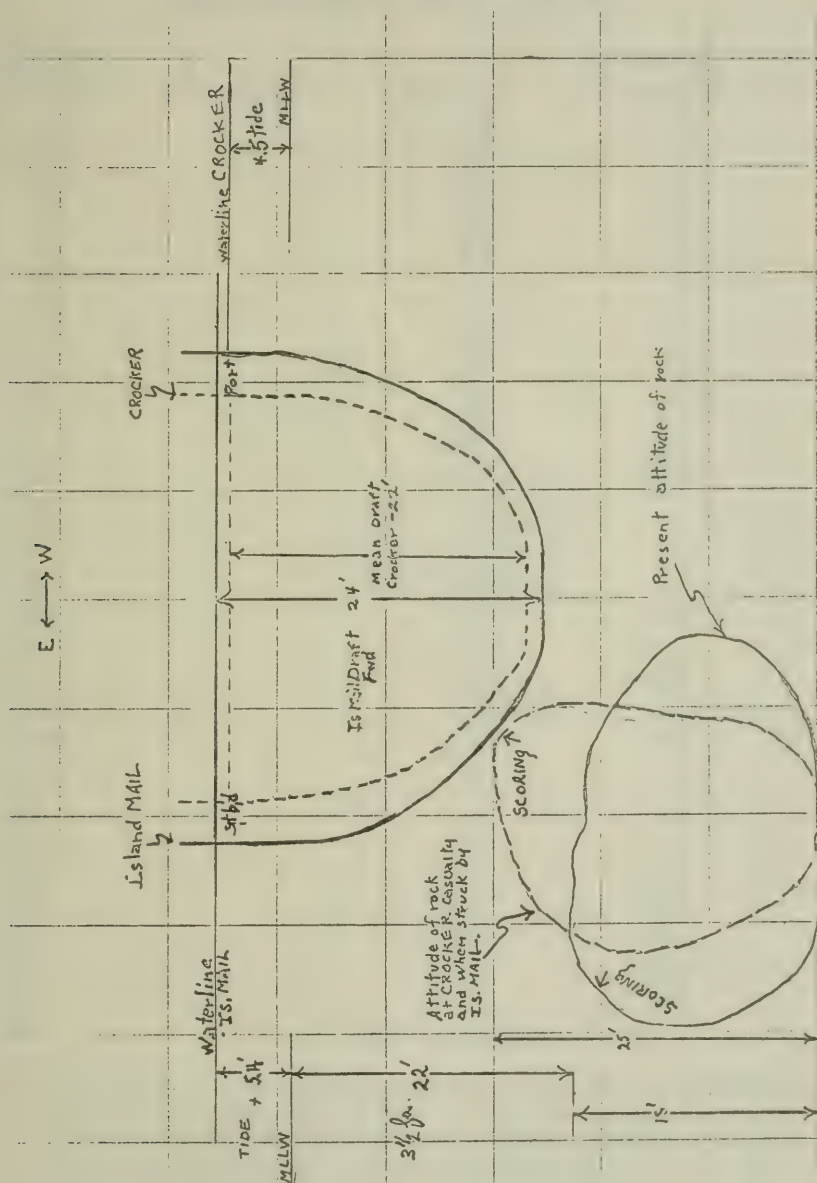
APPENDIX 4

Plot of CROCKER Positions per Conway (Excerpt from U.S.C. & G.S. Chart 6380)



APPENDIX 5

Graphic Presentation—
Island Mail, Crocker and 3.5 Rock



APPENDIX 6

TABLE OF EXHIBITS

(Page References to Transcript)

Exhibit Number	Identified	Offered	Received or Rejected
1	1	12	13
2	12	13
3	395	395
4	12	13
5	12	13
6
7	12	13
8	12	13
9	12	13
10	12	13
11	657	657
12	657	657
13	Not Offered	
14	12	13
15	Not Offered	
16	131	131
17	19	19
18	612	612
19	12, 619	13, 619
19B	617	617
20	12	13
21	12	13
22	12	13
23	12	13
24	895	895
25	895	895
26	895	895
27	12	13
28	Not Offered	

1. Exhibits 1 to 125 (except 40A and 79A) were indetified in the Exhibit List, CR 96-105. Exhibits 126 and 127 were identified as Additional Exhibits, CR 111. Exhibits 128 to 130 were identified as Additional Exhibits, CR 112. Exhibit 131 was identified as an Additional Exhibit, CR 113.

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Exhibit Number	Identified	Offered	Received or Rejected
29	12	13
30	396	396
31	396	396
32	12	13
33	Not Offered	
34	Not Offered	
35	Not Offered	
36	12	13
37	12	13
38	896	896
39	896	896
40	12	13
40A	668	668	668
41	12	13
42	Not Offered	
43	12	13
44	12	13
45	396	396
46	12	13
47	12	13
48	12	13
49	12	13
50	12	13
51	619	619
52	12	13
53	12	13
54	396	396
55	12	13
56	12	13
57	896	897
58	896	897
59	396	396
60	12	13
61	Not Offered	
62	147	147
63	897	897
64	155	156
65	146	146
66	232	232

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Exhibit Number	Identified	Offered	Received or Rejected
67	233, 479	479
68	Not Offered	
69	762	762
70	155	156
71	155	156
72	762	762
73	Not Offered	
74	20, 155	20, 156
75	762	762
76	763	763
77	763	763
78	130	131
79	12	13, 112
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79A	478	568	568, 762
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81	12	13
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90	12	13
91	12	13
91A	57	57
92	12	13
93	12	13
94	396	397
95	196	200
96	898	898
			(Rejected)
97	898	898
			(Rejected)
98	Not Offered	
99	Not Offered	

A20

Exhibit Number	Identified	Offered	Received or Rejected
100	Not Offered	
101	899	899
102	899	899
103	899	900
			(Rejected)
104	474	474
105	1005	1005
106	Not Offered	
107	377	378
			(Rejected)
108A	202	202
108B	202	202
109	Not Offered	
110	Not Offered	
111	Not Offered	
112	Not Offered	
113	Not Offered	
114	Not Offered	
115	Not Offered	
116	Not Offered	
117	Not Offered	
118	Not Offered	
119	196	200
120	389	484
121	15	16
122	15	16
123	15	16
124	901	901
			(Rejected)
125	35	37
126	13	13
127	13	13
128	901	902
			(Rejected)
129	277	278
130	902	903
			(Rejected)
131	13	15
132	211	903	903

A21

Exhibit Number	Identified	Offered	Received or Rejected
133	413	466	467
133A	431	466	467
134	925	925	926
135	960	960	960
136	1095	1095	1096
137	1096	1096	1096
138	1121	1121	1121
139	CR 89-94	1145	1145

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No. 20129 and 20130

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For the Ninth Circuit

In the matter of the Petition of AMERICAN MAIL
LINE LTD., a corporation, owner pro hac vice of
the American Oil Screw ISLAND MAIL, Official No.
241157, for exoneration of liability, et al.

UNITED PACIFIC INSURANCE COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANTS

DETELS, DRAPER & MARINKOVICH
JONES, GREY, KEHOE, HOOPER & OLSEN
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ABBREVIATIONS

App.	-	Appendix
C. G. Tr.	-	Transcript of testimony at Coast Guard Investigation
CR	-	Clerk's Record
FF	-	Finding of Fact
GB	-	Government Brief
MLB	-	American Mail Line Brief
MLLW	-	Mean Lower Low Water
PCB	-	Private Cargo Brief
PTO	-	Pretrial Order
T.	-	True
Tr.	-	Transcript of Testimony

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REPLY BRIEF OF APPELLANTS

I. ARGUMENT

A. Introduction

The Government's posture in this Appeal, as disclosed by its Combined Opening Brief, is inaccurate as to the facts, and erroneous as to the law.

Factually, it distorts the record as to both the CHARLES CROCKER and ISLAND MAIL casualties.

Legally, it asks this Court to:

1. *Ignore or misread Indian Towing Co. v. United States;*

2. *Legislate the "agency discretion" exception of the Tort Claims Act into the Suits in Admiralty Act; and*

3. *Declare the novel principle that a tort-feasor is not liable to an innocent claimant for the latter's full damages if a third party was also negligent.*

This reply brief is organized as follows:

B. Factual Restatement

1. The ISLAND MAIL struck the 3.5 rock and rolled it over;

2. The Government, through both the Coast Guard and the Coast and Geodetic Survey, acted negligently following the CROCKER incident.

C. Applicable Legal Principles

1. The Government, which compels ship operators to purchase and maintain Government-published charts, is liable to innocent cargo for damage resulting from negligence in its compilation of information and publication of such charts.

2. The "Agency Discretion" exception of the Tort Claims Act has no application to this action, under the Suits in Admiralty Act.

3. Under controlling principles of admiralty law the concurrent negligence of Soriano (if he be found negligent) does not relieve the negligent Government of liability to cargo, in whole or in part.

B. Factual Restatement

1. *The ISLAND MAIL struck the 3.5 rock and rolled it over.*

Private Cargo reviewed, at pages 15-19, and argued, at pages 43-49, of its Opening Brief, the evidence which, in our submission, compels a finding that the ISLAND MAIL struck the 3.5 rock and rolled it over. (See also Appendix 5 to that Brief.)

The Government, committed to the striking of the 3.5 rock by the ISLAND MAIL by Stipulation in this case, and contention in the *Soriano* case, treats this contention only in footnote 4 on page 84 of its 115-page brief, stating:

“The Government does not utilize space in this brief to delineate the improbability of the 3.5 rock having been rolled over by the ISLAND MAIL.”

Since the District Court variously described this contention of Private Cargo as “the most probable possibility” (Tr. 1138) and as “convincing and plausible” (Tr. 1143), the Government’s space-saving but cavalier treatment of the point invites closer scrutiny.

The Government contended below (PTO, CR 36, Par. 1) that the ISLAND MAIL struck the 3.5 rock, and in its appeal against *Soriano* it assigns error to the District Court’s failure to so find (Specification of Error 6, GB 57). It argues this contention at pages 77-82 of its Brief. It avoids recognition that rolling of the rock by the ISLAND MAIL would fully explain contact between vessel and rock and instead attempts to lead this Court into the realm of metaphysics.

“. . . [T]hough the exact mechanics of the striking are not known . . . how the rock was hit is not important as long as the ultimate fact that the rock was hit is established . . .” (GB 78)

It goes on to concede that even the maximum sinkage figure of 2'8" testified to by its witness Beal¹ would not close the gap between the rock (as it lay after the ISLAND MAIL casualty when found by divers) and the point of impact on the ISLAND MAIL, three feet above the keel. It suggests, however, that this Court should find the sinkage of the ISLAND MAIL to have been greater than the maximum figure mentioned in the evidence which it offered to the District Court, which evidence that Court declined to receive for any purpose (Tr. 349).²

Not content with this effort to close the gap by reliance on excluded testimony, at GB 80 it represents to this Court that Beal testified that passing over the 3.5 rock would increase the sinkage of the vessel. The experiments (with dissimilar hulls) on which Beal predicated his testimony were performed in a model basin having a smooth bottom (Tr. 334). Beal was not asked (and did not testify) what, if any, effect the passage of a vessel over a pinnacle rock would have on sinkage. The three record references cited by the Government on page 80 of its brief for the assertion that passage over a pinnacle rock would increase sinkage (Tr. 321, 315, 324-325) refer to the effect proceeding into shallower water would have on sinkage. Since the 2'8" figure testified to by Beal as maximum sinkage of the ISLAND MAIL was related to "running in 36 feet of water for . . . approximately a half a mile" (Tr. 321), and it is clear that the ISLAND MAIL

1. And set forth in its Answers to Interrogatories. Tr. 339.
2. Private Cargo takes vigorous exception to the Government's repeated reliance on testimony which was either excluded or admitted for a carefully limited purpose. See also, pp 8, 9 of this Brief.

did not run in 6-fathom water for any such period of time (see, e.g., GB App. 3), even the 2'8" opinion figure was unsupported by the factual evidence. The effort to urge this Court to assume even greater sinkage is a measure of the Government's desperation in refusing to accept the inescapable conclusion that the rock was rolled by the ISLAND MAIL, and that it previously stood in a position in which contact with both ISLAND MAIL and CROCKER would occur.

We reproduced, in Appendix 5 to our Original Brief, a sketch presented to the District Court which demonstrates the impossibility of contact between ISLAND MAIL and rock in its present attitude, and the complete consistency of contact by both ISLAND MAIL and CROCKER with the rock, if it was rolled by the ISLAND MAIL.

The impossibility of contact between ISLAND MAIL and rock in its present attitude is illustrated with equal clarity in App. 1 to the *Soriano* brief.

When it is recalled that the Mate, Gunderson, felt the ISLAND MAIL had rolled something over (testifying in the Coast Guard hearing before the 3.5 rock was found by divers) (C.G. Tr. 286-7), this "most probable possibility" (Oral Opinion, Tr. 1138), becomes an inescapable conclusion, at least as between parties agreeing that the ISLAND MAIL struck the rock.

The Government, in its further effort to close the vessel-rock gap without accepting the only rational explanation thereof—rolling of the rock—urges the Court to do so: (1) by speculating as to pitch; and (2) by attempting to impeach the Tide Tables, Ex. 58, and the District Court's Finding of Fact 5 (Tr.

146-147) (which the Government prepared) that the tide at the time and place of the casualty was 5.4' above MLLW; and (3) by attacking (without any contrary evidence) the District Court's finding that the initial point of impact between ISLAND MAIL and rock was 3' above the keel at Frame 159 (FF 43, Oral Opinion, Tr. 1136).

Most significantly, the Government's brief evades any explanation of how, if the rock was in its post-ISLAND MAIL posture when first struck by the ISLAND MAIL, the easterly side of the rock came into contact with the starboard side of a northbound vessel, although the District Court found that, if the rock was rolled over from west to east, ". . . the areas of damage to the vessel would be consistent with the marking noted on the south side and the easterly portion of the top of the rock." (FF 43, Tr. 1138).

The poverty of the Government's position, in urging, as against Soriano, that this Court must find that the ISLAND MAIL struck the 3.5 rock—a fact stipulated between Private Cargo and Government—while refusing to concede (or even discuss) that the rock rolled, (a contention the District Court found "plausible and convincing") illustrates, better than further argument by Private Cargo could hope to do—why this Court should find that the rock was rolled.

We welcome, however, the Government's recognition, at least when it is arguing as appellant against Soriano, that a fact may be established by "a showing of reasonable probabilities" (GB 78, 81). We leave it to this Court to determine whether rolling of the rock is a more reasonable probability than

the *only other* Government suggestion to explain contact between rock and vessel—i.e., greater sinkage than the maximum testified to by its own expert, *plus* a smaller tide than shown by Ex. 58 and found by the District Court, *plus* a point of initial impact on the hull of the ISLAND MAIL deeper than testified to by any witness or found by the District Court, *plus* pitching of the vessel, of which there was no evidence whatever.

Independently of the Private Cargo-Government stipulation, the evidence compelled a finding that the ISLAND MAIL struck the 3.5 rock and rolled it over. As between parties to that stipulation, no other conclusion is permissible.

2. *The CROCKER struck the 3.5 rock in 1952.*

The Government devotes 30 pages of its Statement of the Case (GB 3-32) to the CROCKER incident, in an endeavor to support the District Court's finding that the CROCKER did not strike the 3.5 rock. Its position is based on the following three premises:

- (a) Commander Conway plotted the information obtained by him from the Second Mate Burris and Helmsman Johnson of the CROCKER to give a distance off Smith Island Light of 1.6 miles;
- (b) Coast and Geodetic Survey witness Edmonston "determined" (GB 16), by comparison of fathometer soundings with the hydrography that the track of the CROCKER was 1.6 miles off Smith Island Light;

- (c) There were "hundreds" of other rocks in the area, some one of which the CROCKER struck.

Not one of these premises is supportable under the facts in evidence.

(a) *Conway's "evidence."*

Commander Conway did not testify that he determined the point of striking of the CROCKER, but rather confessed that he could not do so, although he concluded it was within the 10-fathom curve west of Smith Island (Tr. 1053-55).³

His testimony was largely concerned with the hearsay relation of what the *ex parte* statements to him of the Second Mate and Helmsman of the CROCKER had been, some twelve years before, in an investigation in which none of the parties to this litigation, except the Government, was represented. Burris and Johnson were not called at the trial of this case by the Government, and were never subject to cross-examination on behalf of Private Cargo (or Mail Line or Soriano). Thus, the District Court properly ruled that Conway's testimony was not admissible on the issue of where the CROCKER striking occurred (Tr. 1023, 1029, 1030). In fact, at trial Conway's hearsay testimony was not offered by the Government for the veracity of what members of the CROCKER crew had said (Tr. 1023, 1029). Private Cargo pointed out, in its Opening Brief, the limitation placed on the offering and receipt of this portion of Conway's testimony (PCB

3. "I could not ever deduct where it grounded." (Tr. 1054) "I could go up and make an arc in my own mind and my recollection would put it in several areas where it could have been." (Id.)

22, f.n. 11; 51). The Government's brief nowhere recognizes that this testimony was offered and received for a limited purpose, and the Government clearly invites this Court to consider it on the issue of where the CROCKER struck, as it must since the District Court's finding that the CROCKER did not strike the 3.5 rock is otherwise unsupportable. If there is some legal precedent for this extraordinary invitation, the Government's brief does not supply it. We know of none.

Conway's "hearsay" plot of the hearsay evidence of Burris stands on still poorer footing, as to the issue of the location of the CROCKER casualty, than Conway's hearsay testimony itself. As pointed out in our Opening Brief, Conway's plot which placed the CROCKER'S track 1.6 miles off Smith Island Light, based on his hearsay testimony as to Burris' *ex parte* statements, contained a plotting error, in that he laid off a course of 339° T intersecting Cattle Point Light rather than 340° T, the bearing actually stated by Conway as given him by Burris. The effect of this plotting error, perhaps unintentional, was to place the CROCKER closer to the Light than the hearsay testimony itself. Conway himself testified that he had plotted it several times, and "it usually has been 1.7 [miles]" (Tr. 1051). In point of fact, accurate plotting of a course line of 340° T intersecting Cattle Point Light would leave Smith Island Light 1.75 miles abeam. While criticizing us for inviting the attention of this Court to that error (as we invited the attention of the Court below to it—Tr. 1121-48), the Government's Brief does not deny that Conway's plotting

was defective. (GB 9). It cannot do so. The exhibit (40A) is before the Court.⁴

Indeed, the Government itself now plots Conway's version of Burris' testimony as 1.7 miles off Smith Island Light (GB App. 3) although it mislabels that course track as "CN 340 CROCKER (Burris) 1.7 miles." Burris, of course, did not testify.

There is no support for a finding that the CROCKER casualty occurred 1.6 or less miles west of Smith Island Light in either the hearsay testimony or the hearsay plotting of Conway.

(b) *Edmonston's testimony.*

The Government's brief repeats, in numerous verbal formulations, the unsupported assertion that Edmonston "determined" that the CROCKER casualty occurred 1.6 miles off Smith Island Light. Edmonston did not so testify. His examination with reference to the CROCKER'S fathometer readings was confined to the consistency or inconsistency of such readings with the hydrography at various distances off the Light. He did eliminate 2.2 miles off as inconsistent. He testified that, at 1.6 miles, the soundings were "fairly consistent" with the hydrography (Tr. 1106), and that, at 1.8 miles, they were not too inconsistent (Tr. 1108). No claim to having determined the location or distance of the CROCKER striking was made by Edmonston, and no amount of Government repetition that he made

4. The Government also criticizes our use of a post-ISLAND MAIL chart (showing the 3.5 rock) for Appendix 4 to our opening brief (GB 10) in view of the change in the position of Smith Island Light. The only position charted thereon by reference to a Smith Island Light is "281° two miles from the Light," and it was plotted in relation to the 1952 position of the Light.

such a determination can supply this lack of testimony.

A further comment on Edmonston's "hydrographic study" should be made. He was instructed as to the courses and speed of the CROCKER he was to assume, and asked to compare the hydrography at a distance of 2.2 miles off at Tr. 1044—*after* Court reconvened at 1:30 p.m. on the last day of testimony. At Tr. 1051-1052 he was asked to make a second comparison at 1.6 miles. His testimony as to those distances commenced at Tr. 1090 (a few minutes *after* 3:00 p.m.—see Tr. 1087). He was excused at Tr. 1110. Court adjourned at 3:58 p.m. (Tr. 1116). Prior to Tr. 1107, he had not checked any distances except 1.6 and 2.2 miles. His comparison at 1.8 miles begins at Tr. 1107 and ends at Tr. 1108, a brief interlude in the court session of 58 minutes in which 26 pages of transcript were taken, from 3:00 p.m. to 3:58 p.m.

The extent of the allowable limits of advocacy is a somewhat subjective matter. Clearly, however, such limits were closely approached, if not exceeded, by the sweeping claims of the Government's brief as to the testimony of Edmonston. Representative are the following excerpts from its brief:

"the 1.6 mile hydrographic determination [of Edmonston]" GB 16

"the 1.6 mile determination of Edmonston" GB 16

"In sum, proctors for Private Cargo were unsuccessful in attempting to make . . . a trained hydrographer . . . interpret the Flint soundings as indicating that the CROCKER was at a greater distance than 1.6 miles from Smith Island Light at the time of her casualty." GB 17

Had Edmonston testified that, in his opinion, the CROCKER casualty occurred 1.6 miles or less westerly of Smith Island Light—and he did not—he would have been subject to vigorous cross-examination as to the basis for such an opinion, based on widely-spaced (250 to 290 feet—GB 43, 44) fathometer soundings recorded in the hydrographic surveys at 20-second intervals by vessels not on the course track of the CROCKER. Neither the Government, which produced Edmonston as a witness, nor the District Court, which examined him as to “consistency” of the fathometer readings with the hydrography, asked Edmonston to position the CROCKER at the time of her casualty. The farthest limit of his testimony was that the 1.6 mile distance was “the most consistent” of *those that he had been requested to review*, although 1.8 was not too inconsistent (Tr. 1108), and Edmonston admitted that west of the 1.6 mile track the soundings were “rather consistent.” (Tr. 1103-4)⁵

Edmonston’s comparisons made no allowance for sinkage of which the Government makes much in its appeal against Soriano. Sinkage of the

5. The Government criticizes (GB 13), the table appearing on page 27 of our Opening Brief, setting out Edmonston’s comparison of the pre-striking fathometer readings with the depth datum. The figures used are taken verbatim from Edmonston’s testimony at Tr. 1099 and show that all pre-striking fathometer readings showed water deeper than that shown on the chart at the 1.6 miles distance. The Government’s tabulation (GB 14) conspicuously omits a comparison of the 1402 fathometer sounding (the starting point for the comparison), 11¾ fathoms, with the depth datum, while including the post-casualty soundings made at 1407 and 1408 following a hard left turn and impact, when course and speed of the CROCKER were unknown, and Edmonston himself testified that his assumed track of the CROCKER was “arbitrary” and that he didn’t “know how accurate they were.” (Tr. 1091)

CROCKER would require further correction of her fathometer soundings by decreasing the actual depth of the water under her oscillator, and would thus require shifting of Edmonston's overlay further west, into somewhat deeper water, to produce the same order of consistency. For example, allowance of 2 feet for sinkage of the CROCKER, would require increasing all adjusted fathometer readings of the CROCKER (presented in Ex. 14 PCB A-8) by $\frac{1}{3}$ fathom.

(c) *The "hundreds of rocks."*

Confronted with the necessity of denying that the CROCKER struck the 3.5 rock, and the utter absence of any other possible rock as a candidate for the CROCKER casualty, the Government obliquely suggests that there were "hundreds of rocks inside the 10-fathom curve . . . readily available within the Smith Island Shoal" (GB 72). There is nowhere else in its brief any mention of the undeniable fact that the CROCKER struck a rock, and that no rock, other than the 3.5 rock, has ever been found (much less charted) by diving, wire-dragging or hydrography, which could, by even remote possibility, have been struck by the CROCKER.

The Government's explorations disclosed only one other rock—the so-called "4-fathom rock", at a distance of approximately 1.6+ miles from the Light. At the plus 4.5' stage of tide at the time of the CROCKER casualty, 29.5' was the least depth of water over the top of that rock. The Government does not suggest the CROCKER hit this rock, and the District Court, in a finding not attacked by the Government, specifically found that the CROCKER did not strike the 4-fathom rock. (FF 38, CR 158).

There is a kind of consistency, perhaps, in the Government's factual posture. Confronted with the fact that Conway's hearsay testimony as to the *ex parte* statements of some CROCKER crew members was not offered and not received on the issue of the location of the CROCKER casualty, it ignores the terms of its offer of such testimony and the District Court's evidentiary ruling, and argues such testimony to this Court *in extenso*. Confronted with the fact that Edmonston was not asked, and did not purport, to determine the location of the CROCKER casualty, it repeatedly insists that he did. Confronted with the absence of any rock, other than the 3.5 rock that the CROCKER could, by any possibility, have struck, it speaks of "hundreds of rocks."

The wire-dragging operation did not everywhere extend to or inshore of a 1.6 mile radius from Smith Island, but as Appendix 3 to the Government's Brief shows, it did extend to within 1.5 miles of the Light for approximately 5° to either side of the 281°T bearing reported by Flint.⁶

In the years from the CROCKER casualty to date, no rock other than the 3.5 rock, which the CROCKER could have struck has been discovered, much less charted. To speak of "hundreds of rocks", as does the Government, proves, on close examination, a confession of its inability to specify even a single other possibility. Nothing Private Cargo can say more eloquently demonstrates the certainty that the CROCKER struck the 3.5 rock than the Government's studied avoidance of the only rational

6. And Flint's bearing (as contrasted with his distance) from Smith Island is nowhere impeached by testimony, hearsay or otherwise. This bearing passes approximately one ship-length from the 3.5 rock.

explanation of the ISLAND MAIL having struck the 3.5 rock—the roll over. The District Court's finding that the CROCKER did not strike the 3.5 rock (FF 38, CR 158) was clearly erroneous.

3. *The Government Was Negligent.*

The District Court found the conclusion that "the Government was negligent, perhaps grossly so" "inescapable" (FF 43 Oral Opinion, Tr. 1142). The factual basis for this finding was fully discussed at pp 30-38 of our Opening Brief, and in this reply brief we merely point out wherein the Government's treatment of this issue is inaccurate or misleading.

At GB 23, it is stated that the District Court found that the 90-minute patrol boat "search" "was in all respects proper." The statement omits the important qualification contained in the District Court's actual finding (FF 35, CR 157) that "the action taken by the Government, *based upon Captain Flint's original radio message and his original official report Form No. 2691 of Marine Casualty*, was in all respects proper." [Emphasis supplied] Nothing whatever was done by the Government when it learned at Portland in July, 1952 (1) that the CROCKER had struck not wreckage, but a rock; (2) that the least depth of water over that rock at MLLW was approximately 17.5 feet; and (3) that the fathometer soundings reported by the vessel gave reason to believe that the position of the casualty was easterly of the position originally reported to it (and still further east of the position it erroneously published in the Notice to Mariners and then charted).

At GB 104, the Government states that the District Court "determined that Commander Conway

had performed his duties properly." The finding cited, FF 41 (CR 159) is as follows:

"The fault within the Government was not the fault of any one person in not doing something he should have done or in failing to carry out his duties, but basically a fault of the Government to formulate a plan for the coordination and dissemination of information."

The Government's claim for this finding is perhaps arguably fair, but it is hardly the ringing endorsement of Conway which its brief intimates.

In point of fact, the Coast Guard through Conway knew in July, 1952, every circumstance surrounding the CROCKER incident which was known at trial—except the results of the Government's 1961 diving, wire-dragging and hydrographic operations. Conway knew the CROCKER had struck a rock, not wreckage, contrary to the original report and the Notice to Mariners; he knew the CROCKER had a mean draft of 21'11", and that the rock struck had a least depth of water over it, at MLLW, of approximately 17.5 feet; he knew (or *says* he knew) it was inshore, or easterly, of the position reported by Flint, as well as of the position published in the Weekly Notice to Mariners and charted by the Coast and Geodetic Survey; he knew that the "Wreckage Rep." legend which the Notice stated would be placed on the charts was based on information both incorrect as to location and type of obstruction, and incomplete in that it gave no notice that it had been struck by a surface-navigating vessel, or as to the depth of water over it; he knew that the Government's charts showed no rock which the CROCKER could have struck anywhere between Captain Flint's reported position, and his own plot for the vessel's

track, or for a considerable distance inshore of the latter track.

In the light of this evidence as to Conway's knowledge, and the fact that he was under instruction to report "if something isn't right", to the Coast and Geodetic Survey, the District Court's finding that the Government's negligence was in its failure "to formulate a plan for the coordination and dissemination of information" (FF 41, CR 159) was clearly erroneous, if construed to mean that Conway was not negligent in failing to act in view of the knowledge he had and his instructions.

C. Applicable Legal Principles

1. *The Government is liable for damage resulting from negligent publication of Official Charts.*

The Government's characterization of Private Cargo's legal contentions is hardly designed to place the issues of the case in focus for consideration by this Court. Private Cargo, says the Government, is seeking to impose "... liability on the United States for the actions of a pilot over whom the Government had no control." (GB 88).

Of course no contention has been or will be made that the Government is liable for the negligence of Soriano.

Elsewhere it is urged, presumably in response to some contention of Private Cargo, that:

"There is no legal duty imposed on the Government to search for non-existent rocks in territorial waters of the United States or to remove from charts an official report made by the Master of a vessel and confirmed by his sworn testimony that he struck an obstruction at a defined location." (GB 83)

The first curious thing about the quoted statement is the reference to a "non-existent rock". The 3.5 rock exists—the Government contends and has stipulated that the ISLAND MAIL struck it, and the evidence compels a finding that the CROCKER struck it. It is only the rock, or one of "hundreds of rocks", which the Government contends the CROCKER struck, which is non-existent.

More remarkable, however, in the light of the *Indian Towing* case, is the assertion that the Government has no duty to "remove from charts an official report made by the Master of a vessel and confirmed by his sworn testimony that he struck an obstruction at a defined location," if this assertion is intended to have application to the circumstances of this case.

The Government did not put the Master's report, or any reasonable interpretation thereof, on its charts. Rather, it charted it inaccurately as to latitude and longitude, and not at all as to depth. A nautical chart is a two-dimensional representation of data as to three dimensions—latitude, longitude, and vertical relationship to mean lower low water. The Weekly Notice to Mariners was inaccurate as to both latitude and longitude, and entirely silent as to depth, giving no notice even that the reported object had been struck by a surface-navigating vessel. For all that was stated, the object had been snagged by a bottom-fishing net, or found by recreational divers or a submarine. The charts, prepared by the Coast and Geodetic Survey, which had no information except the Weekly Notice to Mariners, and asked for none, was likewise inaccurate as to longitude and latitude, but rather than being silent as to depth, as was the Notice, the charts were af-

firmatively misleading on that critical point, as the testimony of Edmonston revealed beyond possibility of argument. ("In looking at the chart today, I see twenty fathoms of water in the area.") (Tr. 969).

Moreover, unless the Government is somehow precluded from ever changing or supplementing the first report of a Master in the preparation of its charts, it should have corrected the "Wreckage" legend to a rock symbol when drydocking of the vessel established that the CROCKER had struck not wreckage but a rock.

Finally, it is clear that the Government places no such sanctity as the quoted statement implies on the reports it receives from Masters of vessels. It received evidence—the fathometer data—which disclosed, it now says, the inaccuracy of Flint's report—and it obtained other information on the basis of which it charged Flint with negligence and reprimanded him "for failure to take bearings" (Conway, Tr. 1061).

Under statutory authorization to provide charts for safe navigation of marine commerce (33 U.S.C. A. § 883a), the Government placed incomplete and inaccurate information on its charts, which, under statutory authorization to promulgate regulations for the safety of life and property at sea (14 U.S.C.A. § 2) it compelled shipowners to purchase and have available aboard their vessels at all times (46 Code of Federal Regulations § 97.05-5). These statutes and regulations are printed in PCB App. 1, pp A-1, A-3 and A-6. Upon learning that some of the information on the charts was definitely inaccurate and concluding that the balance was also inaccurate, the Government did nothing.

The fact that the statutory language authorizes, rather than directs the activities of the Coast Guard and Coast and Geodetic Survey which are here at issue, can hardly avail the Government, after *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), which is completely dispositive of the Government's argument that it had no duty of care in the publication of charts or information to mariners (GB 88-91). *Builders Corporation of America v. United States*, 320 F. 2d 425 (9th Cir. 1963) and cases like it, are inapposite to the situation here presented where, as in *Indian Towing*, the Government has exercised the authority conferred by statute and "engendered" (in this case, "compelled" by exercise of its regulatory power) reliance. Naturally, in its discussion of duty, the Government does not discuss *Indian Towing*.

When the Government does discuss *Indian Towing* (GB 93-94), it is solely to categorize it as a case concerning responsibility of the United States in connection with "Government-owned" aids to navigation. If the Government perceives a legal distinction between a structure erected by it as an aid to navigation and a chart published by it as an aid to navigation, under which it is liable for negligence in the maintenance of the structure, but not liable for negligence in the preparation of the chart, it fails to enlighten this Court as to the rational basis for the distinction. We can conceive of none.

While not binding on this Court, the decision in *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960) cert. den. 364 U.S. 933 (1961), in which liability was imposed on the Government for negligent conduct of Search and Rescue activity, because it had undertaken to perform such activity, shows

that there can be no rational distinction as to liability based on the presence or absence of a "Government-owned" structure. The Government does not attempt to explain or distinguish *Gavagan*, discussed by Private Cargo at PCB 64. It does not cite or discuss it.

The Government does attempt to deal at GB 95 with *Pioneer Steamship Co. v. United States*, 176 F.Supp. 140 (E. D. Wis. 1959), discussed at PCB 61-63. It explains the imposition of liability in that case as being based on the Government's original ownership of the offending underwater obstruction. Private Cargo quoted at length from the decision, and repeats briefly here, as follows:

"Defendant failed to exercise reasonable care when it did not ascertain the location of this possible hazard with any degree of certitude by further inquiry of the vessels in question [those reporting strikings in the area] and when it did not employ appropriate means to determine the potential existence thereof." *Pioneer v. U.S.*, *supra*, at 147.

The *Pioneer* court specifically excluded Government ownership of the structure as the basis for decision, saying ". . . defendant did not create the hazardous condition by its own act . . .", *Ibid*, at 146. Ownership was immaterial in *Pioneer*, and non-ownership is immaterial here.

At GB 97, the Government cites *Wheeldon v. United States*, 184 F. Supp. 81 (N. D. Cal. 1960) and other cases, for the proposition that it has no duty to take any action with respect to obstructions it does not own. The holding of that case was that the Government was under no liability, under the Tort Claims Act, for failure to mark a wreck, for

the reason that a private owner would have no liability for failure to do so after abandonment. A clearer refutation of the Government's attempted distinction of *Pioneer v. United States*, *supra*, *Otness v. United States*, 178 F. Supp. 647 (D. Alaska 1959) and *Everitt v. United States*, 204 F. Supp. 20 (S.D. Tex. 1962)—that liability was imposed because of Government ownership of the offending obstruction—could hardly be imagined. None of those cases, or *Indian Towing*, rests on Government ownership.

Nor is the Government's position aided by the two cases, one British and one Canadian, cited in the footnote at GB 90. *Candler v. Crane, Christmas & Co.*, (1951) 2 K.B. 154 involves the liability of an accountant for a negligent audit. As its brief discussion of *Iron Ore Transport Company Limited v. Queen*, (1960) Can. Exchequer Court Reports 448, suggests, the principal issue was the obligation of the Crown to maintain a shipping channel—no contention was made that the Crown had been put on inquiry as to the existence of an obstruction.

2. *The "Agency Discretion" exception of the Tort Claims Act has no application to this action, under the Suits in Admiralty Act.*

At GB 103, the Government argues, primarily from Tort Claims Act cases (*Dalehite v. United States*, 346 U.S. 15 (1953); *Builders Corporation of America v. United States*, 320 F.2d 425 (9th Cir. 1963)) that the "agency discretion" exception is available to it here. While urging that the negligence shown cannot be tortured into the "agency discretion" mold, Private Cargo maintains that defense has no application in a Suits in Admiralty Act proceeding as here, and that cases under the

Tort Claims Act are irrelevant. The “agency discretion” exception, specifically incorporated in the Tort Claims Act, is not found in the Suits in Admiralty Act. Rather, the latter states that actions thereunder “shall be heard and determined according to the principles of law . . . obtaining in like cases between private parties . . .” (46 U.S.C. § 743). A clearer legislative direction that common-law notions of sovereign immunity were not to be preserved is difficult to imagine. The Supreme Court itself has rejected efforts of the Department of Justice to narrow Congressional waivers of sovereign immunity. *United States v. Muniz*, 374 U.S. 150, 166 (1963) (cited at PCB 60, on this precise point, but not discussed in the Government’s Brief).

The Government remarks on the small number of cases cited by Private Cargo. GB 87. We remark on the Government’s failure to distinguish or even discuss some of that small number as well as its ostrich-like treatment of *Indian Towing* and *Pioneer*, and on its labored argument directly contrary to the statements in *Muniz* and *Rayonier* that:

“There is no justification for this court to read exemptions into the Act [Federal Tort Claims Act] beyond those provided by Congress.” (p 166, *Muniz*, and p 320, *Rayonier*)

Surely there is no better justification for imparting exemptions under the Suits in Admiralty Act.

Indeed the Government’s brief is noteworthy for its reliance upon the older as opposed to the more recent decisions of the Supreme Court in the field of governmental liability in tort. While we dispute the over-all contention by the Government that the attempt here is to establish a novel and exotic

theory of liability (not since *Indian Towing*, at least) we are aware that in *Muniz* the Court said:

“... the Government’s liability is no longer restricted to circumstances in which Government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well. *Indian Towing Co. v. United States*, 350 U.S. 61; *Rayonier, Inc. v. United States*, 352 U.S. 315.” (p 159)

At GB 103-108, the Government urges, in support of the decision below, a “close corollary” of the “agency discretion” exception—Government immunity from liability for acts of Government employees involving judgment or discretion. The Government’s Contentions of Law, in the Pretrial Order, asserted no such defense, although the claim of “agency discretion” was set forth, somewhat uniquely, as a denial of the District Court’s jurisdiction (CR 40-41; Par. 5(4)). What has been said as to the “agency discretion” defense would be dispositive of this appellate afterthought as well.

Also relevant is *Somerset Seafood Co. v. United States*, 193 F. 2d. 631 (4th Cir. 1951) in which the Government, having undertaken to mark a wreck, was held liable for negligence in doing so. “There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger.” *Id.* at 634. See also, *United Air Lines Inc. v. Wiener*, 335 F. 2d 379 (9th Cir. 1964) and *Wenninger v. United States*, 234 F. Supp. 499 (D. Del. 1964) stating that, once the Civil Aeronautics Authority has determined that it will issue Notices to Airmen (NOTAMS), warning of flying hazards, “its determination that

a NOTAM should or should not be issued in a particular case was a discretionary decision at the operating level and beyond the jurisdictional exceptions [of the Tort Claim Act]." (Ibid, 504)

3. *A tort-feasor is liable to an innocent claimant for the latter's full damages, although a third party was also negligent.*

At GB 111-112 the Government urges that if "both Soriano and the United States are found to be negligent, the United States is liable only for half damages to Private Cargo."

Not one of the fourteen cases cited by the Government in this section of its brief contains any authority, *dictum* or otherwise, for the unique proposition thus advanced.

As far as our research discloses, this contention was last advanced by a litigant in admiralty 90 years ago, in *The ATLAS*, 93 U.S. 302 (1876). There, cargo aboard a barge in tow by the tug KATE was lost as a result of collision between KATE and ATLAS. Cargo libelled ATLAS only. The District Court held the collision to have been caused by mutual fault of KATE and ATLAS and awarded Cargo only half damages against ATLAS. The Supreme Court reversed, holding innocent Cargo entitled to full damages against ATLAS, notwithstanding fault of KATE, stating as follows:

"Parties without fault, such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damages which they suffer from the wrongdoers, and they may pursue their remedy in personam, either at common law or in the admiralty, against the wrongdoers or any one or

more of them, whether they elect to proceed at law or in the admiralty courts." 93 U.S. at 319.

None of the cases cited by the Government is in any way concerned with the rights of an innocent claimant against one of two or more tort-feasors, and none questions the holding in the *ATLAS*.

The WONDER, 79 F. 2d 312 (2nd Cir. 1935) is, however, instructive. There, a tug owner libelled the City of New York, as owner of an underwater cable. The City impleaded the contractor who had contracted to install the cable and the latter impleaded the subcontractor who performed the work. From a decree awarding full damages to the libelant against the City, the latter appealed. The Court of Appeals held City and subcontractor to be joint tort-feasors, and modified the decree to allow the City to recover from the subcontractor half of the damages awarded against the City to the libelant.

We state unequivocally that no case cited by the Government involves, directly or indirectly, the contention made in this section of its brief.

Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951) is apparently considered the most applicable decision, since the Government cites it twice although without discussion of the specific holding, and without any purpose signal for such citation. Somerset sued the United States to recover for loss of its vessel, alleging that the Government had been negligent in the marking of a wreck. The Court of Appeals held that Somerset's vessel, *THE ANDERSON*, had been negligently navigated into collision with the wreck; that the United States had been negligent in marking of the wreck; and that Somerset was entitled to half-dam-

ages. We leave it to the Government to explain, if it can, how that or any of the other cases cited in the paragraph beginning at the bottom of GB 111 support its assertion that it is not liable here to innocent cargo. The cited section of Gilmore & Black, *THE LAW OF ADMIRALTY*, § 7-17, reiterates the familiar American rule of divided damages between tort-feasors in mutual fault cases. The rights of innocent cargo are not discussed.

The cases cited in the first full paragraph beginning on GB 112 are restatements, in various factual settings, as to the plasticity of admiralty practice. Typical is *The DUKE OF YORK—HAITI VICTORY*, 354 U.S. 129 (1957), which holds that a District Court, sitting in Admiralty has jurisdiction, in a limitation proceeding, to determine a cross-claim by the petitioner against a claimant, and cross-claims between claimants. None of these cases stands for the Government's proposition, or even discusses any such contention.

IN REPLY TO BRIEF OF APPELLEE AMERICAN MAIL LINE, LTD.

II. ARGUMENT

The principal issue on this appeal can be stated as follows:

If, as the District Court found, the 10-fathom curve west of Smith Island is "a definite warning of danger" (FF 15, Tr. 149), is a vessel not equipped with an operable fathometer, sea worthy for the purposes of a passage in that area?

Mail Line makes much in its brief (MLB 23) of the inconsistency between the position adopted by Private Cargo in its appeal against the Government and our position in the appeal against Mail Line.

The claimed inconsistency is between our contentions, in the Government case: that the 10-fathom curve was not a definite warning of danger; that the Government's publications indicated adequate depths for safe passage of ISLAND MAIL on the outer or westerly edge of the curve; and that Soriano was not negligent in navigating the ISLAND MAIL on a track over the 3.5 rock, and our contention against Mail Line, that the ISLAND MAIL was unseaworthy because her fathometer was not operable.

That these positions are inconsistent we fully concede, but the inconsistency is that of the District Court, which found, on the one hand, that the 10-fathom curve was a definite warning of danger; and that penetration of it was negligence on the part of Soriano (except in the Government-Soriano case), and on the other hand, that ISLAND MAIL was seaworthy, although the only instrument capable, as a practical matter, of reporting immediately and continuously the depth of water under her keel was inoperable.

Private Cargo attacks the finding that the 10-fathom curve was a "definite warning of danger". (Specification of Error 16, PCB 42). That finding is essential to the position of the Government in the Private Cargo-Government appeal, since Conway's claimed justification for inaction to correct the erroneous and misleading information published by the Government is based on the contention that it

would be negligence for a navigator to penetrate the 10-fathom curve.

If, but only if, this finding that the 10-fathom curve was a definite warning of danger is affirmed, does seaworthiness require that the fathometer be operable.

Neither the District Court's opinion, nor the brief of Mail Line purports to explain how the seaworthiness of a vessel with an inoperable fathometer can be maintained concurrently with a finding that penetration of the 10-fathom curve, a "definite warning of danger", is negligence.

The evidence is undisputed that a fathometer, and only a fathometer, was capable of giving immediate and continuous readings as to the depth of water under ISLAND MAIL's keel and thus warning as to its full-speed penetration of the 10-fathom curve. A sounding machine cannot do this. A sounding machine can only give one reading at a time and the lead must be reeled in to observe the tube in order to actually obtain a reading. Before another sounding can be taken the glass tube must be recoated, if it is a chemical type tube, or cleaned and allowed to dry, if it is a ground-type tube. A sounding machine is a substitute for the deep-sea lead and is located on the exposed deck where its boom can be swung over the side of the ship. It is not located in the pilothouse and it cannot be directly observed by the navigating personnel. It is not a substitute for a fathometer. On the contrary, most soundings are now made by means of a fathometer. (Exhibit 55, *Bowditch* pp. 132-133).

The capability of a fathometer was directly illustrated by the testimony at trial. When the fath-

meter of the CROCKER indicated $3\frac{1}{2}$ fathoms under the keel, Captain Flint immediately ordered hard left, knowing his vessel was in insufficient water (Ex. 14; PCB App. 2). Had a fathometer been available and used on the ISLAND MAIL it would have given immediate indication that the vessel had penetrated the 10-fathom curve. Pilot Soriano intended to remain seaward of the curve, and believed he was seaward at the time of the ISLAND MAIL casualty. (Tr. 64-66). An operable fathometer would have given Soriano immediate information that he was inshore of his intended track. Any vessel response whatever to a helm order for left rudder would have avoided the 3.5 rock.

At MLB 24, Mail Line argues the lack of evidence as to proximate cause. It recites that two witnesses, Lindholm and Hare, made no reference to a fathometer. They were not asked. Einmo would have used the fathometer (Tr. 365). Smith and Curry did not think it was necessary in that area, but they did not regard the 10-fathom curve as a warning of danger (Tr. 768, 834), a position which the District Court rejected.

Due diligence is not an issue. If the 10-fathom curve was a "definite warning of danger", Mail Line, which admittedly sent a vessel to sea with an inoperable fathometer for a passage in that area, clearly failed to exercise due diligence to make the vessel seaworthy.

Similarly, if due diligence was not exercised, the exemptions of Section 4(2) of COGSA, 46 U.S.C. §1304(2) are not available to Mail Line. Neither "negligence of mariners" nor "perils of the seas"

under COGSA relieve from liability a carrier which has failed to exercise due diligence to make its vessel seaworthy. (See cases cited at PCB 85, not discussed or distinguished by Mail Line). An operable fathometer would have readily detected penetration of the 10 fathom curve by the ISLAND MAIL. Accordingly, the failure of Mail Line to make the existing fathometer on the ISLAND MAIL operable was a proximate cause of the stranding, if the 10-fathom curve was "a definite warning of danger" in the area west of Smith Island and Mail Line is liable to Private Cargo.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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37 1967
No. 20129

United States Court of Appeals
For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, et al,
Appellants,

vs.

AMERICAN MAIL LINE, LTD.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

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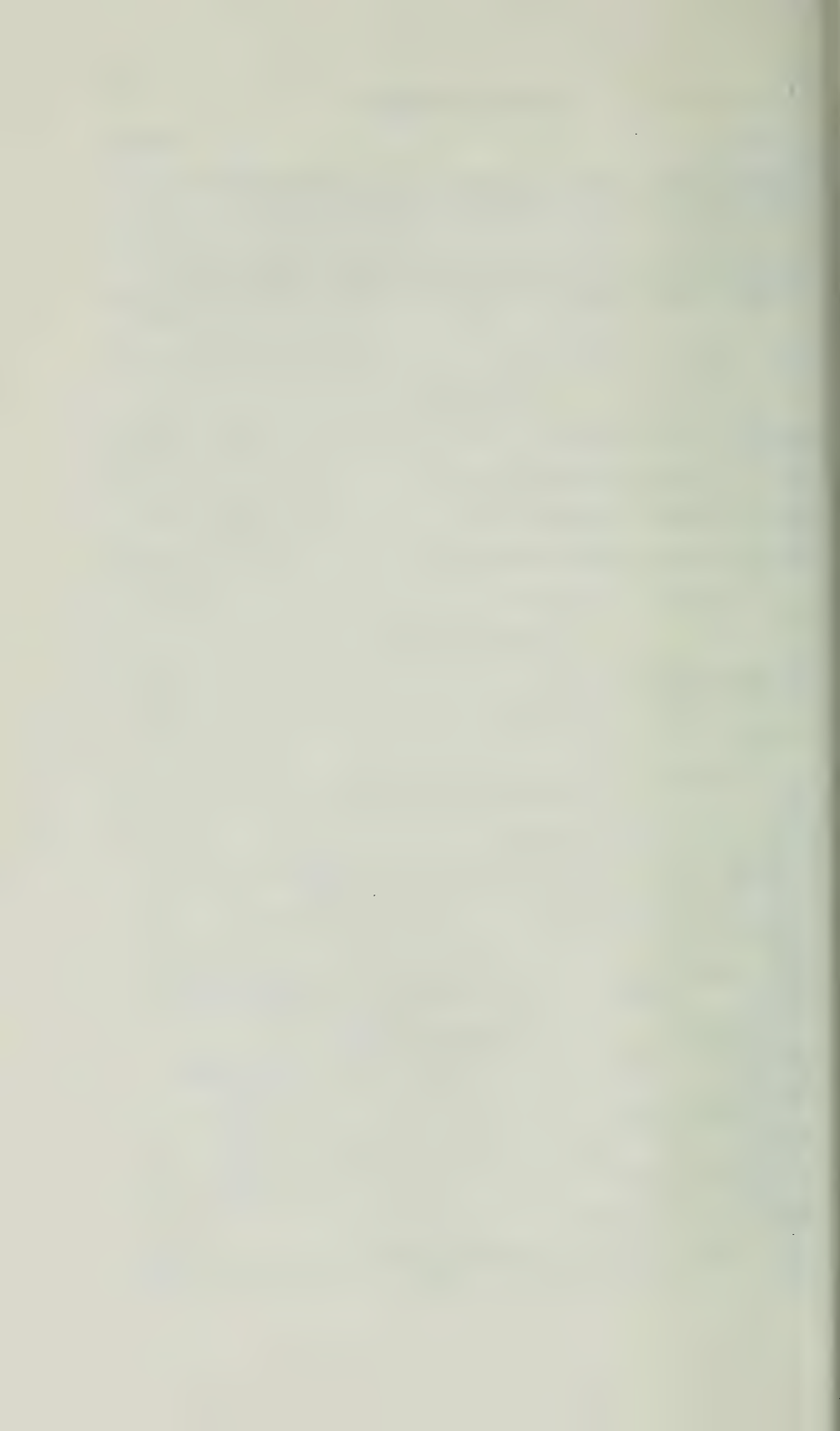
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ABBREVIATIONS

(CR.....) — Clerk's Record
(CG Tr.) — Coast Guard Transcript
(CL, CR) — Conclusions of Law, Clerk's Record
(FF, CR) — Findings of Fact, Clerk's Record
(PTO, CR) — Pre-Trial Order, Clerk's Record
(Cargo Brief) — Private Cargo Brief
(Cont., CR) — Contention, Clerk's Record
(Cont. Fact, CR) — Contention of Fact, Clerk's Record
(Cont. Law, CR) — Contention of Law, Clerk's Record
(Exh.) — Exhibit
(Gov. Brief) — Government Brief
(Tr.) — Reporter's Transcript



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HONORABLE WILLIAM T. BEEKS, *Judge*

BRIEF OF APPELLEE
AMERICAN MAIL LINE, LTD.

I.
STATEMENT OF THE CASE

A. Background of Private Cargo’s Appeal

A further statement of the background of the various proceedings growing out of ISLAND MAIL’s casualty will help to understand the present appeal of Insurance Company of North America, et al (hereinafter “Private Cargo”) against American Mail Line, Ltd. (hereinafter “Mail Line”).

ISLAND MAIL's casualty caused substantial particular average damage to both military cargo owned by the United States of America (hereinafter "Government") and privately owned cargo. Also large general average expenses and sacrifices were incurred by Mail Line and some cargo interests before ISLAND MAIL was able to continue on her voyage; so a general average was declared.

Mail Line ultimately filed a Petition for Exoneration from or Limitation of Liability (Dist. Ct. Adm. No. 16733) in which proceeding claims and answers were filed for particular average damage to cargo by (1) the Government, and (2) the 41 interests constituting Private Cargo, identified as appellants at CR 244-245, who appeal sub nomine Insurance Company of America, et al. When the Government refused to recognize liability for general average, Mail Line commenced litigation seeking its recovery. This was done in the limitation proceeding by a cross-libel against the Government and by a separate suit (Dist. Ct. Adm. No. 16876).

Private Cargo which now appeals against Mail Line was joined by 121 other cargo interests, all identified as appealing libelants at CR 181-186, in bringing suit against the Government (Dist. Ct. Adm. No. 16875) seeking recovery of particular average damage and general average contributions. These cargo interests appeal in No. 20130 sub nomine United Pacific Insurance Company, et al.

When the aggregate of all claims filed in the limitation proceeding did not approach the limitation fund, the District Court exonerated Mail Line's ad interim stipulation (Docket entires 56, 115; CR 6, 9) and treated both Private Cargo's and Government's claims against Mail Line as ordinary libels for cargo damage. (CL 2-3, CR 237). Both the Government's and Private Cargo's particular average claims against Mail Line are subject to the Carriage of Goods by Sea Act (hereinafter "COGSA"), 46 U.S. Code § 1300, et seq. By virtue of the Amended "Jason Clause" (CR 18), the same principles apply to Mail Line's general average claim against the Government.

The Government, while claiming particular average against Mail Line and defending (1) the latter's suit for general average, and (2) Private Cargo's suit for particular average and general average, filed suit (Dist. Ct. Adm. No. 16853) against ISLAND MAIL's pilot, Dewey Soriano (hereinafter "Soriano"), alleging his negligent navigation caused the Government's losses. From the outset of all litigation and through the trial, the Government also vigorously contended ISLAND MAIL was unseaworthy and the condition of her fathometer contributed to her striking the uncharted rock. Its argument was exactly the same now advanced by Private Cargo (Cont. Fact 9, CR 38).

The District Court's decrees dismissed both the Government's and Private Cargos' particular average

suits against Mail Line and awarded the latter recovery of general average, reserving to the Government the right to dispute the amount of contribution should it disagree with the adjustment. The general average adjustment has not yet been completed. Once Mail Line's only antagonist, the Government has not appealed and now accepts the trial court's decision because it asserts, "The proximate cause of the ISLAND MAIL's casualty was the sole negligence of Soriano" (Gov. Brief 113). Neglect of a pilot in the navigation of the ship, of course, is an exception given a carrier by COGSA. 46 U.S. Code § 1304 (2) (a).

Private Cargo's position from the filing of its claim and answer in the limitation proceeding through the trial was, to say the least, anomalous to that now taken in this appeal. Its claim and answer merely alleged "general unseaworthiness, the particulars of which will be determined on discovery" with a reservation of right to amend as additional information became available (Claim § VIII, CR 200). The trial court, upon application of the parties, treated all litigation growing out of ISLAND MAIL's grounding as "protracted". Fifteen pre-trial conferences were held. Extended discovery by way of depositions, production of documents, interrogatories, and requests for admissions of facts was undertaken.

The upshot of the pre-trial procedure was the Pre-Trial Order in which Private Cargo's lack of conviction on

the fathometer was shown by the absence of any affirmative contentions of fact or law that ISLAND MAIL was unseaworthy or her fathometer's condition was a cause of her casualty. Private Cargo's position then was "it does not intend to contest such facts [seaworthiness and lack of proximate cause] at trial by evidence to the contrary" (Cont. 4, CR 35). At the same time Private Cargo asserted ISLAND MAIL was "navigating properly" when her casualty occurred (CF 31, CR 74), that "neither said pilot nor the *ship's operator*, master, officers, or crew had any knowledge of or reason to be aware of the existence or location of the rock involved" (Emphasis added) (CF 32, CR 75), that the stipulated position of the 3.5 rock "was located in an area shown by the Government charts to be safe for the navigation of a ship drawing 29' 2" of water under the conditions of weather and tide then obtaining" (CF 34, CR 75), and that "The ten fathom (sixty feet) curve shown on charts pertaining to the area West of Smith Island and any blue shading therein, which indicated the configuration of the ocean floor, did not in themselves constitute a warning to the ISLAND MAIL, with a draft of 29' 2" on its Voyage 59 West that said vessel should not navigate in any part thereof" (CF 42, CR 76-77). For the moment we pass mention of Private Cargo's present, similar contentions (Cargo Brief 67-73).

During the trial Private Cargo did not offer any evidence of, or assert any unseaworthiness of ISLAND

MAIL or any proximate cause between the non-operating fathometer and her striking the 3.5 rock. It waived argument on its claim against Mail Line, as did the Government. Immediately after argument, but before decision on the other cases, the trial judge dismissed both the Government's and Private Cargo's particular average claims and granted Mail Line general average from the Government saying:

"The Court is satisfied that the inoperability of the fathometer did not render the vessel unseaworthy. There were available at all times on the ISLAND MAIL sufficient instruments which, if properly used, could have enabled the pilot or a navigator at any time to precisely locate the position of the vessel" (Tr. 1122).

B. Mail Line Vis-A-Vis Other Litigants

Aside from this appeal against Mail Line, the three other litigants before the Court battle each other. Much is said about causation. Supposed erroneous findings of facts by the trial court are argued very extensively. Since ISLAND MAIL was seaworthy, it is immaterial to Mail Line which theory of causation, or what facts, are adopted, for its exoneration must be granted in any event. *United States v. Los Angeles Soap Co.*, 83 F.(2d) 875, 879 (9 Cir., 1936). We point out, however, that reversals of the findings and conclusions in the other appeals will give Mail Line additional grounds for exoneration. And, as we shall demonstrate, the trial court was not "clearly erroneous" in finding Soriano's negli-

gence was the proximate cause of ISLAND MAIL's striking the 3.5 rock.

Clearly the "gut" issues in the other appeals involve disputed questions of fact, i.e., (1) whether ISLAND MAIL struck the 3.5 rock to make Soriano negligent in the Government's appeal, and (2) whether CHARLES CROCKER struck the same rock in United Pacific, et al's appeal against the Government. Of these disputes, the first presents an inconsistency with what the trial court found in this case. The second was not considered relevant (FF 23. CR 236).

Mail Line, Private Cargo, and the Government, however, stipulated the striking of the 3.5 rock. Private Cargo and the Government both devote much of their briefs to establish this fact independently of the stipulation. If this Court should reject the evidence referred to by Private Cargo and the Government and affirm Soriano's dismissal, the result will be that ISLAND MAIL struck some unidentified and never found rock outside the ten-fathom curve as was found in Soriano's case (FF 22-24, CR 278-279). That result would establish causation due to a "peril of the sea" which is an exemption granted a carrier under COGSA, 46 U.S. Code § 1304 (2) (c). If Soriano is exonerated because of lack of negligence with a finding that ISLAND MAIL struck the 3.5 rock, Mail Line must be excused also on a "peril of the sea" basis.

Alternatively, the Court could find causation resulted from the Government's negligence in publishing improper charts which were justifiably relied upon by Soriano to the detriment of ship and cargo. This is the real thrust of Private Cargo and is also urged by Soriano. It requires a finding that CHARLES CROCKER in 1952 also struck the 3.5 rock. If she in fact did, the trial judge would have considered the Government negligent. Mail Line, in such an outcome, would receive the exemption provided the carrier of "any other cause arising without the actual fault and privity of the carrier," contained in COGSA, 46 U.S. Code § 1304 (2) (q). Such negligence would extend to Mail Line, as it would to Soriano, regardless of any benefit to Private Cargo, because they do not have to hurdle the questions of reserved sovereign immunity in cases of "agency discretion" and "misrepresentation" argued by the Government.

II.

SEAWORTHINESS

A. Analysis of Private Cargo's Assertions on Unseaworthiness

Private Cargo refers to Knight's "Modern Seamanship" which is not an exhibit. It says that ISLAND MAIL's fathometer was material to her grounding by references to Bowditch "The American Practical Navigator" (Exh. 55) and to isolated remarks of Chief Mate White and Third Mate Gunderson which were stipulated and

agreed to as part of the pre-trial proceedings (CR 88, 100), and not until this appeal, were ever suggested by appellants as evidencing unseaworthiness or proximate cause.

Private Cargo implies ISLAND MAIL's sounding machine would not "pick up" a shoal as she proceeded at her speed of 13 knots, although conceivably a fathometer would have, "if it had been in use". But Private Cargo fails to mention White's testimony under Government cross-examination describing ISLAND MAIL's sounding machine as "an adequate substitute for a fathometer" which could be used at 15 knots (CG Tr. 227-228). Gunderson's testimony was that "If the fathometer had've been working, I doubt very much if it would have been running" (CG Tr. 331).

Captain Andreas S. Einmo said he would use a fathometer only as a "second check" on his bearings. He also testified:

"THE COURT: By the use of an azimuth circle you can obtain accurate bearings and from them accurately calculate your position can you not?"

A. Yes, your Honor" (Tr. 365).

Einmo further testified he "always" used radar to establish his position and he explained:

"THE COURT: As a matter of fact, by proper use of a radar bearing you can determine exactly where you are, can't you?"

A. Exactly" (Tr. 372).

Reference is made to an occasion Soriano used a fathometer on another vessel to pick up soundings when crossing a ten-fathom curve. Indeed, he did — on a vessel undergoing a builder's "shakedown" for the Navy. That vessel's radar was "out", she was in thick fog, and the Navy's and her builder's representatives wanted to find a specific fathom mark to test her anchor! (Tr. 401). Quite properly an attempt to go into the circumstances of the particular trial trip was rejected by the trial court when objection was made by Government counsel that "What they did with the destroyer WADDELL has nothing to do with this case" (Tr. 773).

Finally, Edmondston's testimony about the Government's method of compiling charts (Tr. 951), a phase of the case in which Mail Line's attorney did not participate, was limited to situations where "if the navigator is using his fathometer he can use the depth curve as an additional feature for fixing his position." The trial court, however, accepted the testimony of navigating witnesses that the use of a fathometer in good weather was not necessary when the vessel had so many other ways to fix her position at any time.

B. Seaworthiness Means Reasonable Fitness

Seaworthiness means that the ship must be reasonably fit for the contracted voyage. She does not have to be perfect, or accident free, or an insurer against loss. Even in personal injury litigation the rule is no different.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550, 4 L.ed (2d) 941. 948 (1960).

A few cargo case authorities are: *The SILVIA*, 171 U.S. 462, 464, 43 L.ed. 241, 243 (1898); *In re Gravel Products Corporation*, 24 F.(2d) 702, 703 (2 Cir., 1928); cert. den'd 227 U.S. 347 (1928); *United States Steel Products Co. v. American & Foreign Ins. Co.*, 82 F.(2d) 752, 754 (2 Cir., 1936); *Pillsbury Flour Mills v. Becker*, 49 F.(2d) 648, 650 (W.D.N.Y., 1931); and *President of India v. West Coast Steamship Company*, 213 F. Supp. 352, 356 (D. Ore., 1963), aff'd per curiam 327 F.(2d) 638 (9 Cir., 1964), cert. den'd 377 U.S. 294 (1964).

The cases cited by appellants stand for no more. *Indian Towing Company vs. United States*, 182 F. Supp. 264 (E.D. La., 1959), aff'd 276 F.(2d) 300 (5 Cir., 1960), cert. den'd 364 U.S. 821 (1960), is particularly inappropriate. The tug in *Indian Towing* stranded during high winds. She was not equipped with radar nor a mechanical sounding machine. The only way to sound was by hand lead, which, incidentally, ISLAND MAIL had. The tug's master was "lost" and the mate refused to relieve him after unsuccessfully attempting to establish a position. Presumably there was no effective way to establish a position, but the tug continued on to strand. The case obviously should be limited to its own facts. It does not purport to exact the requirement of a fathometer on all ships in the Merchant Marine.

OVERBROOK, 1932 A.M.C. 719 (S.D.N.Y. 1931), and *Greater New Orleans Expressway Com'r vs. Tug CLARIBEL*, 222 F. Supp 512 (E.D. La., 1963), involved ships with defective compasses, instruments upon which the navigators had to rely exclusively to fix their positions and to steer. Lack of relevancy to ISLAND MAIL with her charts, personnel, and adequate equipment is patent. *The MARIA*, 91 F.(2d) 819 (4 Cir., 1937), would be appropriate if the charts supplied ISLAND MAIL were not current and she was navigated by reliance on them.

Appellants argue that since the fathometer was once operable, it must continue to do so despite alternative and adequate equipment. Our answer is *Louis-Dreyfus v. Paterson Steamships*, 67 F.(2d) 331, 333 (2 Cir., 1933):

“* * * The ship was seaworthy if she conformed to the requirements of her class and service, even though her owner failed to keep her up to a higher standard which he had gratuitously assumed. *The British King* (D.C.) 89 F. 872, affirmed on opinion below, 92 F. 1018 (C.A.A. 2).”

Any question about the exercise of due diligence is answered by a vessel being actually seaworthy. This should be self-evident. See *The SILVIA*, supra, 465; *United States v. Los Angeles Soap Co.*, supra, 879; and *American Tobacco Company v. Goulandris*. 173 F. Supp. 140, 168 (S.D.N.Y. 1959), aff'd sub nomine *Lekas v. Drivas V. Goulandris*, 306 F.(2d) 426 (2 Cir., 1962).

C. Island Mail Found Seaworthy

The trial judge, who lived with this case for “a considerable period of time” (Tr. 6), was fully satisfied by ISLAND MAIL’s seaworthiness. He found she “was in all respect seaworthy” (FF 8, CR 231), “there is no dispute in the evidence with respect to the seaworthiness of the ISLAND MAIL” (FF 22, CR 236), and “she was in all respects seaworthy and fit for the service for which she was intended” (CL 4, CR 237). Until this appeal Private Cargo has never affirmatively “disputed” seaworthiness.

In the pretrial order Private Cargo agreed that ISLAND MAIL was in all respects seaworthy except as to the fathometer which it did not concede, but about which it did not propose to offer evidence to the contrary. (PTO 4, CR 15 and Cont. 4, CR 35). That agreement was supplemented by the stipulation that “On May 29, 1961, the ISLAND MAIL was equipped with adequate azimuth circles, peloruses, radar, gyro compass repeaters and sextants to locate the vessel’s position if used” (Tr. 98). A further stipulation was made that ISLAND MAIL was equipped with an adequate sounding machine in good working order (Tr. 98). When stipulations of evidentiary facts are taken by the court, it may find the ultimate determinative facts from the evidence stipulated and all inferences legitimately to be drawn from them. *Federal Trade Commission v. Pacific States P. T. Asso.*, 273 U. S. 52, 61, 71 L.ed. 534, 538 (1927); *Piedmont*

Canteen Service v. Johnson, 256 NC 155, 123 SE(2d) 582, 91 ALR(2d) 1127.

The statutory requirement for a sounding apparatus, expressed in the alternative of either a mechanical or electronic machine, is found in the provisions of 46 CFR § 96.27-1.

The two agencies of the government most familiar with shipping, the Coast Guard carrying out inspections for the safety of life and property at sea, and the Maritime Administration, which owned and subsidized ISLAND MAIL, were satisfied she was seaworthy. Her Certificate of Inspection (Exh. 31) was unrestricted. The extent of a Coast Guard inspection for seaworthiness purposes is shown in her hull inspection book (Exh. 54). Only a few days before ISLAND MAIL took departure from Seattle she was surveyed and inspected by Maritime Administration Surveyor Frank I. Huxtable whose report went to E. A. MacMichael, Chief, Ship Operations Branch, Pacific Coast District, for the Maritime Administration. Huxtable's survey and MacMichael's letter to Mail Line (Exh. 59) accepted ISLAND MAIL as maintained in accordance with good commercial practice with full knowledge of the fathometer's condition.

White was satisfied the sounding machine was adequate, (CG Tr. 226-227). When Mail Line's counsel proposed to show seaworthiness by adequate equipment on

the Puget Sound voyages only a few days before May 29, 1961, the trial court indicated such evidence would merely be cumulative (Tr. 151).

D. Seaworthiness Does Not Include Negligent Use of Otherwise Adequate Equipement

Seaworthiness requires the carrier to supply a vessel with equipment and navigating data "sufficient to enable a competent man safely to navigate the ship." *The TEMPLE BAR*, 137 F.(2d) 293, 297 (5 Cir., 1943). Note cargo's unsuccessful attack on the sounding machine which was never used when TEMPLE BAR stranded. The general rule is that failure to use navigation data aboard constitutes error in management or navigation rather than unseaworthiness. *United States v. Wessel, Duval & Co.*, 123 F. Supp. 318, 337 (S.D.N.Y., 1954). This Court in *President of India v. West Coast Steamship Company*, *supra*, approved the following:

"In examining the facts in this case we must keep in mind that the ship owner's warranty of seaworthiness does not extend to the negligent use of what would otherwise be a seaworthy ship or appliance. *Billeci vs. United States*, 1962 A.M.C. 826, 298 F.(2d) 703 (9 Cir., 1962)." (Page 356 of District Court's Opinion).

We have quoted the trial court's opinion about the sufficiency of navigating instruments which, if properly used, would enable the pilot or a navigator at any time to precisely locate the position of the vessel. By the use of these instruments a navigator could always determine

whether the vessel was in a position to which a prudent navigator would not have taken her. The trial court's finding was they were adequate "to locate the vessel's position if used by the pilot and ship's officers to give a wide berth to any danger to navigation such as to pass westerly of Smith Island (outside the ten-fathom curve)." (FF 8, CR 231).

The western limit of the ten-fathom curve is slightly less than two miles from Smith Island light. In requiring a "wide berth" the trial court accepted the views of witnesses such as Lindholm who testified "any course half mile or more outside the ten-fathom curve should be prudent" (Tr. 116), and Hare who "would say a reasonably prudent course would be about three miles off Smith Island" (Tr. 244), and Einmo who would go "about two and three-quarters miles * * * from the extremity of — from the island." (Tr. 355).

Actually, the "berth" Soriano proposed to give Smith Island was inside the ten-fathom curve for some considerable distance of travel. This can be determined by measuring the distance between the dotted circle for the "wreckage rep. 1952" symbol and the edge of the ten-fathom curve directly to the east — a distance slightly in excess of one-tenth of a mile. Soriano's testimony, however, was:

"Q (By Mr. Fryer) "What I want to know is, what was the berth that you intended to give the wreckage report of 1952 symbol?"

A Well, I come around — two-tenths, maybe.

Q Between two and three-tenths of a mile?

A Yes.

Q To the east or to the west?

A To the east." (Tr. 64-65).

From the foregoing it is obvious that ISLAND MAIL's clearance to the east of the "wreckage rep 1952" symbol would have intentionally taken her one to two-tenths of a mile within the ten-fathom curve as she cut across the northwest tip of that particular area shown by a blue tint on all charts. Since the proposed "berth" west of Smith Island was to take ISLAND MAIL within "that definite warning of danger" referred to by Private Cargo, we submit that adding a fathometer to the adequate equipment already available to fix ISLAND MAIL's position would be needless. There was certainly no need for additional equipment "to pick up" any warning presented by the ten-fathom curve when ISLAND MAIL's intended "berth", no matter how fixed, was not wide enough in the first place.

The logical question is, what use was made of ISLAND MAIL's equipment? Captain H. D. Smith, ISLAND MAIL'S master, did not participate in her pre-striking navigation. The mate on watch, Howard Gunderson, did not use the ship's equipment to locate her position on any occasion prior to the striking. His positions were determined by "visual bearings" or estimates of distance. He excused his failure to take bearings on a statement by

Soriano that "he (Soriano) was accustomed to take his own bearings, for himself" (CG Tr. 312).

Soriano did not once establish the vessel's position by the full use of her equipment. On only three occasions during the four hours' trip did he take gyro bearings using the ship's azimuth circles. On those occasions only single gyro bearings were taken. The second, or cross, bearings in each instance were visually taken by "seaman's eye". On all occasions the "distances off" points of land or aids to navigation were determined also by "seaman's eye", although radar was available as another way to fix position and particularly "distances off". These methods were not in accord with the cross bearings obtained by use of azimuth circles on the gyro repeaters considered necessary by the trial court to fix position (Tr. 365).

"THE COURT: Wouldn't the two bearings taken by use of the azimuth circle enable you to get a definite fix without the use of the visual bearing on Smith Island light?

A. Yes" (Tr. 452).

The only time bearings using ship's equipment were taken by Soriano during the four hours prior to the grounding were:

Time	Abeam	Nav. Aid	True Bear.	Tr.
1440	Pt. Wilson	Partridge Bank Buoy	328°	418
1500	Partridge Pt.	Partridge Bank Buoy	343°	420
1512	Part. Bank Buoy	Smith Is. Lt.	007°	422-423

After passing Partridge Bank Buoy all beam bearings were taken visually "by looking on the beam" (Tr .29, 30). Bearings ahead were taken by the Kenyon Calculator, an inaccurate device not intended for taking bearings (FF 11, CR 232; FF 11, CR 148). The relative bearings corrected to true bearings were:

Time	Nav. Aid	Rel. Bear.	Gyro	True Bear.	Taken	Tr.
1535	Salm. Bnk.	003° Stb.	335°	338°	Ken.	24-28
	Cattle Pt.	010° Stb.*	335°	345°**	Ken.	25-29
	Smith Is.	090° Stb.	335°	065°	Vis.	25-29
1540	Minor Is.	090° Stb.	350°	080°	Vis.	29-30
	Cattle Pt.	005° Port	350°	345°	Ken.	29-30
	Iceberg Pt.	015 Stb.	350°	005°	Ken.	30

*Described as "approximately" (Tr. 25)

**Described as "probably" (Tr. 25)

Meanwhile, at all times after passing Point Wilson ISLAND MAIL encountered a current towards the east for which no allowance was made (FF 12, CR 233, FF 13, CR 271). Bernard Zetler, Chief of Research Group, Office of Oceanography, U. S. Coast and Geodetic Survey, estimated the currents, within one-quarter knot and possibly varying between the limits of 045° True and 135° True, as follows:

Time	Drift Kts.	Set	Tr.
1440	2.7	115° True	282
1500	2.5	120° True	284
1512	1.2	130° True	284
1535	0.7	090° True	282
1540	0.8	100° True	281

Under these circumstances ISLAND MAIL's course was changed at 1535 from 335° True to 350° True, and again at 1540 by the application of five degrees "right rudder". Both of these course changes, of course, were made on positions for calculations based on the previously mentioned Kenyon Calculator and visual bearings and "seaman's eye" estimates of distances off Smith Island and Minor Island. On the first of these course changes the trial court found Soriano "thought" the vessel was "approximately 2.6 miles" abeam of Smith Island (FF 14, CR 273; FF 12, CR 148); at 1540; at the time of the second course change, Soriano "thought" that Minor Island was "approximately 3.5 miles" abeam (FF 14, CR 273; FF 12, CR 149).

If we accept the 3.5 rock as the one struck, it is clear that the vessel was not in the positions where Soriano "thought" he was at 1535 and 1540. Either his "seaman's eye" bearings and distances on Smith Island and Minor Island were erroneous, or the inaccurate Kenyon Calculator's bearings on the objects about 10 miles ahead were erroneous because ISLAND MAIL could not have traveled

on a course of 350° True for five minutes and then been on a turn to her right for two minutes and still strike the 3.5 rock if she had started from Soriano's positions. The course from his 1540 position to the rock is a 050° True. Yet the actual course at the time of striking according to Helmsman Medeiros was only 355° True (CG Tr. 13, 17-18). At no time between 1535 and 1542 did ISLAND MAIL'S steered course ever take her to the east of where she actually must have been at 1535 or 1540.

The trial court's judgment was that the ISLAND MAIL's casualty was "occasioned by the pilot's failure to fix her position accurately with the means on hand at the times of the aforesaid course changes when an easterly set of the current, for which Soriano did not compensate, would have evidenced itself" (FF 12, CR 233). That finding was exactly like the professional opinion of Commander Conway of the Coast Guard who found CHARLES CROCKER, despite use of a fathometer, was negligently navigated into the ten-fathom curve west of Smith Island and her "grounding was due to failure to take bearings" (Tr. 1053, 1061). His official findings of fact made to the Commandant of the Coast Guard were that "No accurate bearings were taken or other calculations made to determine the exact distance the CROCKER was off Smith Island when Captain Flint commenced to swing the vessel's head to starboard to round Smith Island Lighthouse" (Letter of 11 September 1952, Exh. 40).

III.

PROXIMATE CAUSE

A. Findings of District Court and Private Cargo's
Assertions On Proximate Cause

The trial judge found the condition of the ISLAND MAIL's fathometer "had nothing to do" with her grounding, "the pilot did not consider it necessary to use the fathometer," and under the existing weather conditions "its use was not necessary" (FF 8, CR 231). Answering the Government's assertion that the condition of the fathometer was subject to the Disputes Clause in the space charter under which military cargo was carried, the trial court found there was "no dispute" about "any need for fathometer" (FF 22, CR 236) and "the non-operation of the fathometer had nothing to do with the striking of the uncharted rock" (CL 9, CR 238). These findings were made with recognition that ISLAND MAIL was "inside the ten-fathom curve" (FF 12, CR 233) and that a safe passage "outside the ten-fathom curve" required "a wide berth" of Smith Island (FF 8, CR 231). All of these findings are in accord with the evidence and the law. They are consistent with Private Cargo's attack on the Government.

Specification of Errors 7 (Cargo Brief 40), following State of Points 20 (CR 192), says the Government's negligence "was *the* proximate cause of the striking of the ISLAND MAIL and loss and damage to her cargo" (Emphasis added). Continuing on, Private Cargo says

either accurate charting of the 3.5 rock, or the placement of a symbol indicating the approximate position of danger "somewhere in the vicinity of the outer edge of the ten-fathom curve * * * clearly would have sufficed to prevent the ISLAND MAIL casualty" (Cargo Brief 55). Further on it says, "an adequate chart would more likely than not have prevented this accident" (Cargo Brief 56).

Private Cargo's inconsistency on the need for a fathometer clearly shows when it argues that the charts aboard the ISLAND MAIL "showed adequate depths, and an absence of other dangers, for a distance of at least 0.4 miles inshore of the track of ISLAND MAIL" (Cargo Brief 69), that Soriano was not negligent "to navigate the ISLAND MAIL on the extreme outer edge of the area, 1.87 miles west of Smith Island Light" (Cargo Brief 69), that Government's publications "destroy any basis for finding that the 10-fathom curve is recognized as a danger curve by the Government, or should have been recognized as such by pilot Soriano" (Cargo Brief 70), and "that it was negligence to navigate the ISLAND MAIL on a track 1.87 miles west of the Light, and 486.4 feet inside the outer edge of such area, is unsupported by substantial evidence" (Cargo Brief 72).

B. The Requirement of Proximate Cause

Assuming *arguendo* that ISLAND MAIL's fathometer made her unseaworthy, Private Cargo cannot avoid the findings that the proximate cause of her grounding was not related to such condition. It specifically recognized

the dual requirements of unseaworthiness and proximate cause (Cont. Law 1, CR 79). The cases agree. *The MALCOLM BAXTER JR.*, 276 U.S. 323, 331, 72 L.ed. 901, 904 (1928); *The TEMPLE BAR*, supra, *American Tobacco Company v. Goulandris*, supra; *Levantino v. General Steam Navigation Co., Ltd. of Greece*, 170 F. Supp. 756, 759 (S.D.N.Y., 1959); and *The SAN GUISEPPE*, 1941 A.M.C. 315 (E.D. Va., 1941), aff'd 122 F.(2d) 579 (4 Cir., 1941).

C. Record Evidence of Lack of Proximate Cause of Fathometer to Striking Uncharted Rock

The "Coast Pilot," 1959 Ed. (Exh. 62) on page 221 described navigation on Puget Sound thus:

"Navigation of these waters is simple in clear weather. The aids to navigation are numerous and the chart is a good guide. In thick weather because of strong and irregular currents extreme caution and vigilance must be exercised. Strangers should take a pilot."

ISLAND MAIL'S grounding occurred under ideal sea and weather conditions. Soriano described visibility as "abnormal" (Tr. 407). Gunderson said it was "a beautiful day" (CG Tr. 244) and "excellent" (CG Tr. 312). On page 20 of the Government's brief is a list of at least 13 aids to navigation available in the vicinity of Smith Island to fix a navigator's position. The trial judge's judgment that ISLAND MAIL's position could have been accurately fixed at any time, and not navigated where a prudent pilot would not have taken her,

by use of the ship's equipment and without the need of a fathometer is unanimously supported by the record evidence.

ISLAND MAIL's Second Mate Homer W. Gillette accurately fixed the ship's position 0.5 miles off Davidson Rock by use of an azimuth circle for a gyro bearing plus a radar range when she "rounded" that point after the grounding (CG Tr. 192-193).

Third Mate Roy E. Morgan took gyro bearings and "laid them on the chart" when the vessel reached Ship Harbor (CG Tr. 155-156). Gunderson, of course, said the fathometer would not have been "on" even if operable (CG Tr. 331).

Captain George Lindholm, a Puget Sound pilot called as a Government expert on navigation, failed to mention any need for a fathometer. He described his methods to fix a ship's position using three types of equipment: the gyro-repeater and azimuth circle to get bearings, radar to get "range and distance off," and a sextant to verify "distance off" (Tr. 118-119). Lindholm testified that the method of a prudent, careful navigator passing west of Smith Island in good visibility would include use of "a danger bearing" on anything ahead and "if your outside that bearing then your clear" (Tr. 120). He also described a method of determining distance off by a formula related to the relative bearing of an object on a vessel's bow (Tr. 120). His practice is to take his own bearings for the "first round" to make sure the mate

"takes the right thing" (Tr. 127). When going west of Smith Island, Lindholm, even in clear weather, would plot his positions and bearings on the chart (Tr. 142), because he prefers not to rely on his "seaman's eye for any distance like that" (Tr. 143). Lindholm agreed with the Coast Pilots' characterization of navigation in the Smith Island area during clear weather as "simple" (Tr. 148-149).

Captian Abner C. Hare, another Puget Sound pilot called as a Government expert, also completely omitted any reference to any need for a fathometer when piloting in clear weather on Puget Sound. His technique of piloting west of Smith Island is to take bearings with a pelorus or with an azimuth circle instead of using "seaman's eye" because of the danger of the ship getting "set off the track" (Tr. 247). Furthermore, Hare stated that bearings should be taken at "frequent intervals" in all piloting according to authorities and books on navigation (Tr. 254). Hare would put his bearings on the chart or have the mate on watch do so (Tr. 255).

Captain Andreas E. Einmo was the Government's third expert. His navigation method when on a certain course involves the use of "bow bearings on a certain point" (Tr. 359). As a reasonably prudent navigator the bearings he takes he lays on charts (Tr. 360-361). His only use of the fathometer is as a "second check" on his bearings. We have already discussed his recognition of azi-

muth bearings and radar to determine "exactly where you are" (Tr. 365, 372).

Captain Floyd E. Smith, a licensed Puget Sound pilot called on behalf of Soriano, testified how a prudent, experienced pilot would conduct himself on a vessel such as the ISLAND MAIL making the run from Seattle to Bellingham (Tr. 782). As to any need to use a fathometer, Smith testified that there was no reason for a prudent pilot to use a fathometer on a clear day (Tr. 784, 792).

Captain Robert H. Curry, a licensed Puget Sound pilot, was also called on behalf of Soriano. He testified a fathometer is "not necessary" around the west side of Smith Island (Tr. 834-835). Nor is radar needed on a clear day (Tr. 835-836).

And Soriano, the witness most concerned with these appeals, did not consider for a moment that a fathometer was needed.

"Q Captain, referring back to May 29th on the ISLAND MAIL, did you have any occasion or any reason for using the fathometer on that date?

A Absolutely not" (Tr. 79).

"Q Captain, with respect to a fathometer, in your experience as a pilot and your procedures that you follow as a pilot have you found it necessary to use a fathometer to determine your position or check your position on a clear day when making a passage through the eastern part of the Strait of Juan de Fuca such as around the west side of Smith Island?

A No" Tr. 485).

IV.

**THE EFFECT TO BE GIVEN TO THE FINDINGS
OF THE TRIAL COURT**

Within the past year, this Court reaffirmed its long established rule that findings of a trial court as to negligence and seaworthiness are not to be upset unless "clearly erroneous". *Walston v. Lambertson*, 349 F.(2d) 660, 663 (9 Cir., 1965), cert. den'd.....U.S.....(1966).

The application of this rule to the present appeal needs no elaboration or explanation. Judge Beeks made findings that ISLAND MAIL was seaworthy, that Soriano was negligent, that the fathometer's condition had nothing to do with her casualty, and that, in any event, under any circumstances the fathometer would not have been used. The closest look at the record fails completely to unearth any evidence by which the trial court's findings in this appeal can be said to be "clearly erroneous."

V.

CONCLUSION

Mail Line submits that those Private Cargo interests which appeal in No. 20129 have completely failed to point out on the record where the trial court in making its findings was clearly erroneous. Thus, these findings, supplemented by the total evidence in all related cases, require affirmation of the District Court.

Mail Line prays that the decree of the District Court dismissing the particular average cargo damage claim of Private Cargo be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

EDWARD C. BIELE
Attorney

APPENDIX I
STATUTES AND REGULATIONS
CARRIAGE OF GOODS BY SEA ACT

Bills of Lading Subject to Chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter. 46 U. S. Code § 1300.

Duties and Rights of Carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title. 46 U. S. Code § 1302.

**Responsibilities and Liabilities of Carrier
and Ship — Seaworthiness**

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship; 46 U.S. Code § 1303.

**Rights and Immunities of Carrier and Ship
— Unseaworthiness**

(1) Neither the carrier nor the ship shall be liable for

2-A

loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

Uncontrollable Causes of Loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents

3-A

or servants of the carrier contributed to the loss or damage. 46 U. S. Code § 1304.

CODE OF FEDERAL REGULATIONS

Subpart 96.27 — Sounding Equipment

§ 96.27 — 1 When required.

(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons and over, and all mechanically propelled vessels in Great Lakes service of 1,500 gross tons and over, except paddle wheel vessels, shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus in addition to the deep-sea hand leads. On Great Lakes vessels, a shallow water alarm may be substituted.

EB 7 1967

NO. 20130

IN THE
UNITED STATES
COURT OF APPEALS
For the Ninth Circuit

UNITED PACIFIC INSURANCE COMPANY, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLANTS' PETITION FOR REHEARING

DETELS, DRAPER & MARINKOVICH
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NO. 20130

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PETITION FOR REHEARING

COME NOW United Pacific Insurance Company, et al, appellants in Docket No. 20130, herein, "Private Cargo", and, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, respectfully petition this Court for rehearing of their appeal.¹

Judgment affirming the decree of the United States District Court was entered September 27, 1966.

Rehearing is requested upon the following grounds:

1. This Court (and the District Court) erred in failing to give proper effect to the stipulation of Private Cargo and the appellee United States that the vessel ISLAND MAIL struck the 3.5 rock and this Court erred in sustaining the District Court's clearly erroneous finding that, at the time it was struck by ISLAND MAIL the 3.5 rock extended only 18 feet above the bottom.

2. This Court erred in sustaining the District Court's clearly erroneous finding that the SS CHARLES CROCKER struck, not the 3.5 rock, but a never-located rock in a general area about .27 miles easterly of that rock.

STATEMENT OF GROUNDS

1. Failure to Give Effect to Stipulation

Private Cargo and the appellee Government stipulated that ISLAND MAIL struck the 3.5 rock. Private Cargo was thus precluded from introducing evidence to prove this admitted fact.

The evidence was undisputed that the top of the rock, as it stood when located by appellee's divers, was 27.4 feet below the water surface (at the + 5.4' tide), and that the point of im-

1. Rehearing is not sought by Private Cargo in the companion case of *In Re American Mail Line, Ltd.*, Docket No. 20120, with which the instant case was consolidated for trial and appeal.

pact on ISLAND MAIL (based on her stationary draft) was 21 feet 8.64 inches below the surface.

Thus the stipulated fact of contact between ISLAND MAIL and 3.5 rock was an impossibility, unless explained by evidence. Private Cargo and Government advanced competing contentions to close this gap of 5 feet 7 inches—Private Cargo that at the time of impact with ISLAND MAIL, the rock stood in a different attitude, with its top 19.4 feet below the surface, and that it was rolled by the impact—and the Government that the phenomenon of squat or sinkage deepened the draft of ISLAND MAIL sufficiently to bring vessel into contact with rock.

Each party introduced evidence attempting to support its proffered explanation.

The District Court found that the Government's evidence did not account for the difference (Oral Opinion, F.F. 43, Tr. 1136).

The District Court stated that Private Cargo's contention was "the most probable possibility" (Ibid, Tr. 1138) and "convincing and plausible" (Ibid, Tr. 1143). This Court states:

"If the trial court had found, on the basis of its own evaluation of the evidence, that the ISLAND MAIL struck the 3.5 rock, then Private Cargo's theory of how this occurred would be *most compelling*." (Opinion, page 6—emphasis supplied).

This Court excuses the District Court's failure to find that the 3.5 rock was pushed over by stating that the District Court was "precluded" by the stipulation of Private Cargo and Government "from making an independent determination of whether the ISLAND MAIL struck the 3.5 rock . . ." (Opinion, page 6).

In the circumstances here presented the District Court's finding that the ISLAND MAIL did not roll the rock is, in practical and legal effect, a finding that at the time of impact with the ISLAND MAIL, the top of the rock was 27.4 feet below the surface—and represents an election to find a fact "not

account(ed) for” by the Government’s evidence, in preference to the finding urged by Private Cargo, which the District Court conceded to be the “most probable possibility,” and which this Court says “would be most compelling” if the District Court had found the fact that the ISLAND MAIL struck the 3.5 rock, independently of the stipulation between Private Cargo and Government.

We know of no principle which differentiates between a fact stipulated by the parties (and found by the trial court, based on such stipulation) and a fact found by the trial court, independently of stipulation, or which authorizes a finding—in this case—an implied finding—which is not accounted for by the evidence, in preference to a finding for which the evidence is “most compelling”.

The prior decisions of the Supreme Court, of this Court, and of the Courts of other Circuits are uniform in holding that stipulations of fact are binding upon parties thereto, and courts, trial and appellate.

In *Hackfeld v. U. S.*, 197 U.S. 442 (1905) the Supreme Court reversed a decision of this Court (125 Fed. 596) because of this Court’s failure to give effect to a stipulation of fact, stating at 447: . . . the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.”

In *Berry v. C.I.R.*, 254 F2d 471 (9th Cir. 1957) this Court stated (at 474):

“. . . a *stipulation* by counsel, especially if in writing, *establishes the facts absolutely. Of a certainty it cannot be disregarded.*” (emphasis supplied)

It therefore reversed a Tax Court decision based upon a finding of fact which disregarded such a stipulation.

In *Ringling Bros. v. Olvera*, 119 F.2d 584 (9th Cir. 1941) the parties had stipulated that a contract of employment had been made in Florida. Evidence at trial indicated that it had been made in Texas. This Court held the stipulation binding,

and, applying Florida law, reversed the decision of the trial court.

In *Gray Line v. Goodyear*, 280 F2d 294 (9th Cir. 1960) this Court again adhered to the rule that stipulations of fact are binding.

We respectfully suggest that the proposition adopted by the Court's opinion herein—that a fact stipulated by the parties is entitled to “lip-service” only; that a stipulated fact may receive lesser consideration than a finding of the trier of fact based upon disputed evidence; and that inferences from such fact and other evidence which would be “compelled” if the trier of fact had found the initial fact need not be drawn if the initial fact is “merely” stipulated—is not only in conflict with prior decisions of this Court, and the Supreme Court, but would dictate to counsel that no fact, however undisputed, could be safely stipulated in the future.

2. The CROCKER struck the 3.5 Rock

The keystone of the Court's opinion affirming the District Court's finding that Government negligence was not a proximate cause of ISLAND MAIL's grounding is its approval of the District Court's disregard of the stipulation that ISLAND MAIL struck the 3.5 rock.

The Court did, however, without discussion, hold that the District Court did not err in finding that the SS CHARLES CROCKER struck a never-located rock .27 miles east of the 3.5 rock.

Once the error in failing to find that the 3.5 rock was rolled is corrected, that rock is positioned at a height which corresponds to the damage to the CROCKER, and the 3.5 rock becomes not only the sole candidate for the CROCKER casualty, but one with the most clear and convincing credentials.

Appellants respectfully submit that the scope of appellate review authorized by *Guzman v. Pichirillo*, 369 U.S. 698 (1962) encompasses reversal of the finding in question.

In brief, the evidence on this issue was as follows:

1. An exhaustive Government search, including diving, hydrography and wire-dragging has never located any candidate rock for the CROCKER striking, other than the 3.5 rock.

2. The Government, in possession of all evidence which the District Court received as to CROCKER'S navigation, charted the CROCKER casualty approximately .23 miles *west, not east*, of the later-discovered 3.5 rock.

3. The testimony upon which the District Court apparently relied, Edmonston's comparison of the CROCKER's fathometer soundings with the hydrographic data, was not even offered by the Government, but was elicited by the District Court. At most, Edmonston testified that the hydrography off South Island was more consistent with the CROCKER's soundings at a distance of 1.6 miles west of the Light than further west, but he testified that, on a course track near the 3.5 rock, the hydrography was "not too inconsistent".

This testimony was insufficient to justify rejection of all other evidence on the issue and validate a finding that the CROCKER struck a never-found, never-charted rock in this exhaustively-searched and now carefully charted area.

Respectfully submitted,

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1967

No. 20196 ✓

**United States Court of Appeals
For the Ninth Circuit**

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COUNTY, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

CITY OF SEATTLE, *Appellant*,

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PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE
COUNTY, *Appellee*.

*See also
Vol. 3358*

ON APPEAL FROM THE JUDGMENT OF THE
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EASTERN DISTRICT OF WASHINGTON

**COMBINED BRIEF OF CITY OF SEATTLE
PART I — ANSWERING BRIEF AS APPELLEE
PART II — OPENING BRIEF AS APPELLANT**

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United States Court of Appeals For the Ninth Circuit

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vs.		
CITY OF SEATTLE,	<i>Appellee,</i>	
CITY OF SEATTLE,	<i>Appellant,</i>	
vs.		
PUBLIC UTILITY DISTRICT No. 1 OF PEND OREILLE COUNTY,	<i>Appellee.</i>	

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

COMBINED BRIEF OF CITY OF SEATTLE PART I — ANSWERING BRIEF AS APPELLEE PART II — OPENING BRIEF AS APPELLANT

INTRODUCTORY NOTE

By stipulation dated July 16, 1965, filed in this court, it was agreed by the parties that the PUD (herein also called District) should first file its opening brief, and that the City should then simultaneously answer the PUD's brief and file its opening brief. This brief is, therefore, divided into two parts. Part One answers the PUD. Part Two is an opening brief supporting our cross appeal.

We have used the same designations for reference to the various parts of the record on appeal used by the PUD in its brief.

Because of what in our view are errors of omission and commission in the PUD's Statement of the Case, we are presenting a Counterstatement. In this statement we have not repeated uncontroverted facts set out by the District.

PART ONE

BRIEF IN ANSWER TO PUD APPELLANT COUNTERSTATEMENT OF THE CASE

These proceedings are an aftermath of a decade of litigation between the City of Seattle and Pend Oreille County Public Utility District.

Because we believe previous decisions settled several questions now raised by the PUD, we shall start by reviewing what has gone before.

Chronology of Previous Litigation

The dispute began with Seattle's filing in October, 1953 of an application with the Federal Power Commission for a preliminary permit to explore the feasibility of a hydroelectric project to be constructed at a site known as Boundary on the Pend Oreille River, in northeastern Washington.* In January, 1954, the PUD intervened, asserting that it

*Chronology of the FPC proceedings is taken from Ex. P. 9-11, decisions of the Commission reported at 26 FPC 54-145, 463-468 (1961). Our citations to these decisions will henceforth be to the FPC reports only. However, the full text of these decisions may also be found in Ex. P. 9-11. The chronology to July, 1962 is also set out in the dissenting opinion of Judge Donworth in *Beezer v. City of Seattle*, 60 Wn.2d 239, 243-249, 373 P.2d 796, 798-802 (1962).

owned "electrical" properties in the proposed reservoir area, which were exempt from condemnation by the City because of a state statute, RCW 35.84.030. In August, 1954 the City was granted a three-year preliminary permit. In July, 1957, the City filed an application for an FPC license. A month later, the PUD intervened in opposition, again raising the contention that RCW 35.84.030 would prevent the City from performing under a license, if granted. In September, 1958, the PUD filed a competing application, asking to develop a low-head hydro project at Z Canyon, a site about one mile upstream or south of the Boundary site. In October, 1958, the FPC consolidated the applications for hearing.

Seven mining companies, then owning and working lead and zinc properties immediately adjacent to the river intervened and participated in the subsequent hearings. The mining companies opposed both applications. They contended that if either hydroelectric project were built the entire Metaline Mining District, below reservoir level, might have to be abandoned, because uncontrollable flows of water might leak from the limestone walls of the reservoir into mine workings. (26 FPC 61-62). The Department of the Interior, in response to a request from FPC for its views, replied:

"In view of the importance of the ore reserves in the Pend Oreille Mining District to the welfare and security of the United States, it is recommended that any application for license for dam construction on Pend Oreille River between the Box Canyon Dam and the Canadian Boundary be rejected." (26 FPC 74).

After an extended hearing, which consisted of a tran-

script of 17301 pages and 530 exhibits (26 FPC 62), the examiner who presided at the consolidated hearings filed a comprehensive decision in March, 1961, in which he recommended that a license be issued for Boundary, that the PUD's application be denied, and that the PUD's motion to dismiss the City's application, on state statutory grounds, likewise be denied. (26 FPC 61-145).

The FPC on July 10, 1961 issued its order (26 FPC 54-61) granting the City a license and confirming and adopting the examiner's decision in most respects. The conditions recommended by the examiner (26 FPC 143-145) and imposed by the Commission on Seattle (26 FPC 58-61) presently relevant, were:

1. *Article 37*

"...[The] project boundary except in the vicinity of the dam and powerhouse and except upstream from Metaline Falls shall be 200 feet horizontal measurement from the high-water level of the reservoir."

2. *Article 42*

"Prior to raising the water level of the Boundary reservoir, the Licensee shall at its own cost relocate or make such modifications in mining facilities in the reservoir as may be necessary or appropriate for safe operation of the then existing mines."

3. *Article 43*

"The Licensee shall take appropriate measures to assure the watertightness of the reservoir..."

4. *Article 47.*

"Within ninety (90) days after the license for the Boundary Project becomes effective, Licensee shall install and maintain adequate gaging stations in and along Pend Oreille River..."

5. Article 48.

"The Licensee shall within two years from the time Boundary Project is placed in operation, enter into an agreement with Public Utility District No. 1 of Pend Oreille County to compensate the PUD for encroachment on the Box Canyon Project No. 2042. In the event no satisfactory agreement is concluded by such time, then upon application by the PUD the Commission shall fix and determine the compensation to be made by the Licensee to the PUD for such encroachment after notice and opportunity for a hearing."

On September 6, 1961, the Commission issued an order denying the PUD's and mining companies' petitions for rehearing. (26 FPC 463-468). However, it added a requirement to Seattle's license which had been recommended by the examiner, but initially rejected by the Commission:

Article 49.

"The Licensee shall assign 48,000 kilowatts to the PUD from the Boundary Project at the PUD's system load factor, any part or all of which shall be available to the PUD at cost upon two years' notice by the PUD, to meet the load requirements of present or potential consumers (not including purchasers for resale) within the PUD's service area..." (26 FPC 467-468).

Both the original decision rejecting the examiner's recommendation and the final decision adopting it as Article 49, were by divided votes of the Commission. (26 FPC 61, 468). The 48,000 kilowatts made available to the District at any time on two years' notice was almost four times the annual maximum demand of the PUD in 1958 of its customers in Pend Oreille County. (26 FPC 107).

The Commission's order was affirmed by the Court of Appeals for the District of Columbia Circuit. *Public Utility District No. 1 of Pend Oreille County v. Federal Power Com-*

mission, 308 F.2d 318 (1962), cert. den. 372 U.S. 908 (1963), pet. for rehearing den. 372 U.S. 956 (1963), second pet. for rehearing den. 375 U.S. 871 (1963). Relevant to the present proceedings because of the District's claims of power site value and severance damage, the Circuit Court held that the properties here in question were not used or useful as part of the PUD's "electric plant or system". (308 F.2d 323).

The PUD also intervened in a taxpayer's suit in state court to enjoin the City from executing under its license. Again, it was the position of the PUD that its property and property rights, which are the subject of the present proceedings, were electrical properties, immune from condemnation by the City because of RCW 35.84.030. Although the Washington Supreme Court ultimately held in the PUD's favor, 5-4, on this issue, *Beezer v. Seattle*, 60 Wn.2d 239, 373 P.2d 796 (1962), motion to dismiss app. den. 60 Wn.2d 652, 375 P.2d 256 (1962), mand. granted 62 Wn.2d 569, 383 P.2d 895 (1963), the United States Supreme Court reversed unanimously in a per curiam opinion, 376 U.S. 224 (1964).

The correctness of the FPC's finding that PUD's properties were not part of its electric system, confirmed by the Circuit Court, and upheld by the United States Supreme Court when collaterally attacked by *Beezer*, is apparent when one considers the character of the rights held by the PUD.

PUD Property and Property Rights

Four parcels or property interests are involved in these proceedings. They are described in the findings. (Tr. 84-87). They were inspected by the trial judge on a pre-trial view trip. He also inspected the Box Canyon dam and powerhouse and the Boundary site. (Tr. 80). The PUD purchased all four parcels here involved, as part of a larger package, from the widow of Hugh L. Cooper in 1953 for a total consideration of \$20,100. (Ex. D. 117). This amount covered not only all of the property interests taken in this action but also other Cooper holdings, rights and drawings for the reach of the river between the Canadian border and Lake Pend Oreille, about 75 miles upstream, including the Box Canyon dam site and overflow rights for a distance of 15 to 20 miles upstream from Box Canyon. (R. Tr. 951-952). The rights not involved here were thus necessary for the PUD's Box Canyon project.

The four parcels here in question are the following:

(1) Uplands

The PUD owned 212 acres of uplands on the west side of the river at the Z Canyon site. (Ex. P. 5). Of this acreage the City took 81.73, the area of uplands within 200 feet of the reservoir. This was pursuant to Article 37 of the City's license, which defined the project boundary as "200 feet horizontal measurement from the high-water level of the reservoir." The exact line of taking is shown on a map, Exhibit P. 26.

(2) Fee Shorelands

The PUD owned in fee the shorelands on both sides of

the river from a short distance downstream of the Boundary site up to Lime Creek, two or three miles south, or about 450 chains. (Ex. P. 4). The extent of these shorelands is shown on a map, Exhibit P. 80-A. The Pend Oreille River, in this stretch, flows through a deep gorge, so that the lateral extent of the shorelands is very limited. This is illustrated by two pictures, Exhibits D. 113 and D. 114, which the PUD reproduced in its opening brief following page 6.

(3) *Easement over Shorelands*

The third property interest which the PUD owned (Ex. P. 6) was the right to overflow the shorelands from Lime Creek south to the tailwater of Box Canyon dam, a distance of about 15 miles, or 2400 chains. The nature and extent of the affected shorelands may be seen from Exhibit P. 30, aerial photographs of the entire Boundary reservoir, flown at low flow (R. Tr. 60-61).

(4) *Gaging Station Easement*

The City had already acquired at the time of trial, the underlying fee to the property to which this easement pertains. (Tr. 87). The right acquired was, therefore, extinguishment of the easement, which was a right of ingress and egress over the upland property to reach the site of a stream gage erected by the PUD's predecessor in interest, Cooper, on the fee shorelands. (Tr. 87, 99, Ex. P. 7). The gage itself had been constructed by Cooper as required by FPC preliminary permit (Project No. 44) to explore the feasibility of a project at Z Canyon.

Cooper's application for a license for Z Canyon was later denied by the Commission in 1936. (Tr. 92-93). The United States Geological Survey had operated and maintained the station since 1941. Since August 1, 1954, the City of Seattle had paid all of the costs of maintenance pursuant to its preliminary permit and later its license for Boundary. The City installed, as part of its license obligation, a new substitute gage station a short distance downstream from Boundary dam. The Geological Survey planned to abandon the Z Canyon gage by October 1, 1964. (Tr. 92-93).

The map reproduced by the PUD in its brief following page 6 is inaccurate in that it represents that the PUD had some right or title to the bed of the Pend Oreille River. This contention was disclaimed by the PUD's counsel when the map was offered. (R. Tr. 979). Another shortcoming of the map is that it neglects to show the 200-foot buffer strip of uplands required by the FPC to be included in the project boundaries for Boundary between the dam site and the Town of Metaline. It thus is drawn on the farfetched premise that a developer of Z Canyon would have to acquire property only to the line of ordinary high water.

By appropriate findings the court recorded the facts that the City's project boundaries had been approved by the FPC and that all of the property interests taken were within those boundaries, and were necessary to Boundary project. (Tr. 83-84). These findings are not disputed on this appeal. Therefore, the only issues before this court concern amount of compensation. The PUD contends that the com-

pensation awarded was not enough. The City in its appeal contends that the amount was too much.

The PUD in its Statement did not summarize the testimony of the City's witnesses on value. Their testimony was used by the court in determining the award to the PUD. Hence, review of that testimony is important to an understanding of the issues on the PUD's appeal.

City's Witnesses as to Value

Glen L. Butler

Mr. Butler's qualifications included a degree from the University of Idaho, membership in various professional societies, including past presidency of the Washington Chapter of American Institute of Appraisers (R. Tr. 80), and appraisal work of all types for federal, state and local agencies and for property owners. (R. Tr. 81-82). He had also had extensive experience with the Corps of Engineers as an appraiser with the Walla Walla District. In that capacity he had made detailed appraisals of reservoir property for appropriation purposes for several hydroelectric projects on the Columbia River, including McNary, John Day and Chief Joseph. He had also appraised reservoir property for Priest Rapids for the Grant County PUD, the Howard A. Hansen dam near Seattle, for the Corps of Engineers and Lucky Peak dam, near Boise. He had also appraised property for the Corps in connection with the Albeni Falls project on the Pend Oreille River immediately upstream from Box Canyon. (R. Tr. 82-83).

Mr. Butler made a personal inspection of the properties

to be acquired. (R. Tr. 84-89). He appraised the property interests on two different premises:

- (1) Disregarding the adaptability of the properties for reservoir purposes, and
- (2) Giving full consideration to such adaptability, (R. Tr. 95-97).

Mr. Butler found that "there was no measurable difference" in valuation, under these two different assumptions. (R. Tr. 97).

On his first premise, he found the highest and best use of the uplands to be for reforestation purposes. Based on several comparable transactions which he described in detail (R. Tr. 97-109), Mr. Butler found that the value of the uplands for that use was \$17.50 an acre, or \$1,430.28 for the 81.73 acres. (R. Tr. 129). He found no damage to the remaining uplands by virtue of the taking. (R. Tr. 130).

Mr. Butler also described the extensive investigation he had made upon his second premise. He not only visited the sites of twelve hydroelectric projects in Washington, Idaho and Montana (R. Tr. 91)*, but also examined transactions involving properties in many reservoirs throughout the Northwest. (R. Tr. 90-91). He found one truly comparable transaction involving a sale of one of the abutments of the Dworshak Dam (formerly Bruce's Eddy) on the north fork of the Clearwater River in Idaho. (R. Tr. 110-114). Two

*The locations of the various projects referred to in Mr. Butler's testimony are shown on Ex. P. 28, a Corps of Engineers map.

private individuals sold 60 acres of uplands in 1956 to the Pacific Northwest Power Company, which then had an FPC preliminary permit to study the site, for \$1,000, or \$16.67 an acre. (R. Tr. 114-115, 161-163, Ex. P. 39). Where, as in this transaction, threat of condemnation might have been involved, Mr. Butler took written statements from the sellers to demonstrate the voluntary nature of the transactions. (R. Tr. 117-118).

Other transactions regarded by Mr. Butler as pertinent involved the Rocky Reach and Wells dams on the Columbia. There, he found that no increment or bonus was paid for any of the properties, including an abutment for the Wells dam (R. Tr. 160), because of their adaptability for power or reservoir purposes. (R. Tr. 118-122). Rather, the properties were sold for what they otherwise were, orchard lands, irrigable lands, grazing lands, rocky area and so forth. (R. Tr. 120).

Mr. Butler also used the comparative transaction or market approach to value in analyzing the shorelands. He found that the State of Washington, which owns most of the shorelands in the state, does not appraise them with relation to their potential utilization for power or reservoir purposes, but rather as to their suitability for use in connection with home sites or for recreational purposes. (R. Tr. 125). Mr. Butler described a purchase in 1956 of shorelands by the Pend Oreille PUD in connection with Box Canyon for \$5.00 a chain. (R. Tr. 125-126).

As to the easement over shorelands, Mr. Butler felt that for valuation purposes it was tantamount to a fee. (R. Tr. 128).

Hence, he valued both the fee shorelands and the easement shorelands at \$5.00 a chain, (R. Tr. 129).

Finally, he placed a nominal value of \$1.00 on the extinguishment of the easement for ingress and egress to the Z Canyon gage. His opinion was based on his judgment that since a substitute gaging station was being provided, the right of access to the old gage had no value. (R. Tr. 128).

Mr. Butler's opinion as to value of the PUD's property, as a whole, was \$15,920.72, which he rounded off to \$16,000. (R. Tr. 130).

On cross examination, Mr. Butler stated that he had considered the fact of common ownership of the uplands and shorelands. (R. Tr. 134, 147). He also said, "Power site value, in the market, I have considered in my evaluation." (R. Tr. 134). He simply found from his comprehensive investigation that no premium was paid in the market place for property merely because it formed part of a potential reservoir. (R. Tr. 135-136).

J. C. McQuigg

Mr. McQuigg's qualifications included 35 years as a real estate appraiser, during which time he had appraised a great variety of properties for public and private agencies including everything from airfields to cemeteries. (R. Tr. 168, 212). He likewise inspected the property to be taken and made a survey of transactions involving dam sites and reservoirs in the Pacific Northwest. (R. Tr. 169, 246-247, 257). From this survey he concluded that no "excess prices" were paid for

properties which happened to be within known potential power reservoirs. (R. Tr. 248). As reforestation property, Mr. McQuigg found from a canvass of comparable properties, which he described in detail, a value for the part of the uplands to be taken of \$1,430. (R. Tr. 191-192). He found no damage to the remainder of the uplands from the taking. (R. Tr. 192).

Mr. McQuigg also arrived at what he believed to be the fair value of the shorelands. He described a transfer by the State to Pend Oreille PUD in 1956 of 8,454 lineal chains for the Box Canyon reservoir, for \$5.00 a chain. (R. Tr. 194-200). He also described a transfer of shorelands from the State to Grant County PUD in connection with the Priest Rapids project on the Columbia. These 4,647 chains were transferred in 1961 to Grant County PUD at \$5.00 a chain. (R. Tr. 207). In connection with this transaction, counsel for the City drew the court's attention to RCW 43.09.210, a section of the State Accountancy Act which provides that property transferred from one public body to another of the State of Washington must be for its full value. Mr. McQuigg concluded, from his study, that the value of the PUD shorelands, whether held in fee or merely by way of easement, was \$5.00 a chain. (R. Tr. 207). For reasons similar to those given by Mr. Butler, Mr. McQuigg placed a nominal value on the easement to the Z. Canyon gaging station. (R. Tr. 209-210, 235).

Mr. McQuigg's total valuation was \$15,920. (R. Tr. 210).

He stated on cross that he felt the common ownership of

the uplands and shorelands did not give the property additional value. (R. Tr. 223-224). Mr. McQuigg stated that in his experience, for property to bring power site value, all of the property would have to be assembled, licenses to construct would have to be obtained and markets would have to be established. (R. Tr. 240-241).

SUMMARY OF ARGUMENT

- I. PUD's Specifications of Error Nos. 1-5, and 7 Are Without Merit.
- II. PUD Is Not Entitled to Severance Damage (Specification of Error No. 6).
- III. PUD's Case For Power Site Value Failed Because of Its Failure to Show Reasonable Probability of Devoting Property to Reservoir Use.
- IV. Valuation Methods Used by *Twin City* and *Grand Hydro* Appraisers Were Never Judicially Approved and Were, In Any Event, Different From Those Employed By PUD Witnesses.
- V. The "Taking" of the Power Value of the PUD's Properties Is Not Compensable Because of the Federal Navigation Servitude.

ARGUMENT IN ANSWER TO PUD APPELLANT

The PUD has incorporated much of its argument under its individual specification of errors (App. Br. 33-49). Hence, we shall address ourselves first to these specifications.

Point I**PUD'S SPECIFICATION OF ERRORS NOS. 1-5
AND 7 ARE WITHOUT MERIT****A. PUD'S SPECIFICATION OF ERROR NO. 1
TESTIMONY OF ARTHUR E. ALLEN****(App. Br. 33-38)**

This claim relates to the striking of the testimony as to the cost of constructing a high dam at the Boundary site. (R. Tr. 627-629, 712-721). The witness was permitted to testify over objection as to the cost of a possible high dam at Z Canyon. (R. Tr. 648-669, See also Ex. D. 130-A, analysis of the costs of such a project, received in evidence at R. Tr. 669). The witness also testified over objection as to the cost of a possible low dam at Z Canyon. (R. Tr. 709, Ex. D. 130-B).

The action of the court in striking Mr. Allen's testimony as to Boundary was correct. The PUD's sole property interest anywhere near the Boundary site was shorelands. Its only upland ownership was at Z Canyon. But even assuming this ownership be regarded as sufficient to justify testimony of the cost of a project to be constructed at the Boundary site, it did not justify hearsay testimony as to the costs being incurred by the condemnor in constructing a project there. Moreover, since the court found, and no error is assigned to the finding, that a developer could probably not construct any dam at all at Boundary without a right of condemnation, the ruling had no practical effect. (Tr. 88).

The basis of the trial court's ruling, striking Mr. Allen's testimony as to Boundary, was the well settled principle that value to the taker may not be considered in determining just

compensation. In *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913), the Court said:

“But in a condemnation proceeding . . . the value of the property to the government for its particular use is not a criterion.”

The same proposition was stated in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) where Mr. Justice Holmes, speaking for the court, said:

“And the question is, What has the owner lost? not, What has the taker gained?”

The same principle was recognized by the Court in *United States v. Miller*, 317 U.S. 369, 375 (1943):

“...special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.”

Also see *Continental Land Co. v. United States*, 88 F.2d 104, 110 (9th Cir. 1937), cert. den. 302 U.S. 715 (1937), *Chicago B. & Q. R. Co. v. North Kansas City Dev. Co.*, 134 F.2d 142, 152 (8th Cir. 1943), cert. den. 319 U.S. 771 (1943) and *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), cert. den. 356 U.S. 975 (1958). In the *Moore* case this court recognized the rule that opinions as to value, based upon developments subsequent to the valuation date, are inadmissible. The policy which forbids opinions based on the hindsight of later actual events would be violated if the PUD were permitted to use the City's actual cost experience in using the property to construct Boundary as a foundation for opinion as to the value of its property.

Mr. Allen's use of the City's data was improper under *Miller* and other cases. His rejected report, Exhibit D. 130, as to the cost of a project at Boundary, was admittedly based entirely on the City of Seattle's plans, designs, drawings and costs for a project which was then under construction by the condemnor. (R. Tr. 606-625). He used the actual bids and the contract prices. (R. Tr. 623-627). He even used the City's estimates as to plant output in computing his unit costs. (R. Tr. 625).

Mr. Allen's exhibit and testimony concerning Boundary were entirely grounded on hearsay. He had no connection whatsoever with the preparation of the City's design drawings and specifications. The City objected to his testimony on the ground that it was hearsay. (R. Tr. 627). We assume that if it were proper at all for a landowner to show the exact use to which the condemnor was putting the property at the time of trial, and the actual costs being incurred in putting the property to this use, that the proper procedure would be to call City officials or engineers and have them identify and authenticate the designs and costs. Mr. Allen's attempt to vouch for the City's designs he had copied and the City's costs which he claimed to have obtained was simply not proper from an evidentiary standpoint.

The judge's ruling as to Mr. Allen's testimony on Boundary costs and plant output became academic, in the light of the finding entered by the court. It found that a prospective developer of either the Boundary or Z Canyon site, except for a low dam at Z Canyon, could probably not ac-

quire the necessary properties by voluntary transfer if it be assumed that such developer did not have the power of eminent domain. (Tr. 88). It also reached the conclusion that the PUD did not sustain its burden on this score. (Tr. 94-95). In this circumstance, it is well settled that value of lands for reservoirs or power purposes may not be awarded to an owner. *McGovern v. New York*, 229 U.S. 363 (1913); *New York v. Sage*, 239 U.S. 57 (1915); *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 (1943).

Since the PUD failed to establish this premise which is essential to recovery of power site value, the testimony of Mr. Allen as to Boundary, even if received, would have had no effect. In *McGovern*, the Supreme Court in an opinion by Justice Holmes upheld the exclusion of evidence in a state court as to the exceptional value of land for a reservoir site where it appeared that many properties would have to be collected, stating that the power of eminent domain could not be considered in determining whether this was possible:

“...The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect on the valuation...The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices...
In estimating that probability, the power of effecting

the change by eminent domain must be left out." (p. 372; emphasis supplied).

And in *New York v. Sage*, 239 U.S. 57 (1915), the Court reversed lower federal court rulings admitting evidence on reservoir value of lands sought by the city on the ground that it did not appear that the lands could be used for such purpose without the exercise of eminent domain powers. Justice Holmes said, speaking for a unanimous Court:

"The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. *But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain.* The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact, — not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. *The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain.*" (p. 61; emphasis supplied).

On remand from the Supreme Court, a final order was entered by the District Court excluding the additional compensation for "reservoir availability and adaptability." Learned Hand, J. said:

"I can see no reason to suppose that there was any practical way of uniting this land with adjoining lands into a reservoir site except by the right of eminent domain. The possibility which Mr. Justice Holmes has in mind is that the land might have an added value due to its availability for such a union through the usual course of the market, just as a corner lot has added value in the city of New York if available for an apartment house. Nobody can suppose that a reservoir site can result in that way, or without the right of eminent domain as a necessary condition. If so, no part of the availability value is to be included . . . Even though there was a possible prospect of other cities competing for the land, they would have each proceeded by eminent domain . . ." (*In re Bensel*, 230 F. 932 (1916)).

In *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 the land owner, a public utility, sought water power value for lands taken by the Government on the theory that the lands condemned, together with other property it owned, could be united with several hundred other tracts owned by strangers through the exercise of the utility's state eminent domain powers and that a four-dam hydroelectric project could be constructed upon all those lands. It was conceded that all the property necessary for the four-dam plan could not be acquired except through resort to the power of eminent domain. The Court, based on the *McGovern* and *Sage* cases, threw out an award based on such a theory on the ground that in determining value the power of eminent domain possessed by the land and owner must be left out:

"The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain be left out of account, the

chances of making the combination appear to be too remote and slim 'to have any legitimate effect upon the valuation.' *McGovern v. New York*, supra . . . Respondent therefore has not established the basis for proof of the water power value which was asserted." (p. 285).

Orgel, after analyzing the foregoing Supreme Court cases, stated their teaching as follows:

"If . . . the particular use is not likely to result except through the exercise of the power of eminent domain, it must be excluded in arriving at the market value. Although recognizing the danger of oversimplifying the actual holdings of the courts, we may say that the rule requires the exclusion of the taker from the hypothetical market. The problem is then reduced to that discussed in Chapter II supra, as to what uses may be considered as bearing on the market value of the property. But in canvassing the uses for which the property is available, those uses which require the power of eminent domain to make them effective must be excluded from consideration.

"In other words, under the rule enunciated by the Supreme Court, the owner in contending for a special value for the taker's purposes must show that there was such a probability of other purchasers as would affect the market value and that such probability was independent of the exercise of compulsory powers of acquisition." (1 Orgel, *Valuation Under the Law of Eminent Domain* 381 (2nd Ed. 1953)).

The above rule was applied in *Olson v. United States*, 292 U.S. 246 (1934). That case involved condemnation by the United States of flowage easements over lands bordering on the Lake of the Woods, instituted pursuant to a treaty between the United States and Great Britain entered into in 1925 regulating the use of the lake as a storage reservoir for the development of water power in Canada. The question in the *Olson* case, answered in the negative by the Supreme

Court, was whether the government would have to pay value for reservoir purposes. The Court observed that in order to establish the reservoir, many parcels of land had to be condemned which were owned by many individuals, by the United States, and by other governmental bodies. In denying power value, the Court said:

“... But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. (Citing cases). The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. *But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract together with the other shorelands for reservoir purposes or that another could acquire all lands or easements necessary for that use. The trespass committed by means of the dams added nothing to the value of the shorelands.* (p. 256-257; emphasis supplied).

The rule was stated by this court in *Continental Land Co. v. United States*, 88 F.2d 104 (9th Cir. 1937) which involved condemnation of the dam site for Grand Coulee. It was pointed out there that the lands necessary for the dam and reservoir behind it were in many ownerships, including the United States, and there was no probability of their being united without the exercise of the power of eminent domain. See also *Washington Water Power Co. v. United States*, 135 F.2d 541 (9th Cir. 1943); *Smither v. United States*, 91 F.Supp. 582 (Ct. Cl. 1950), *cert. den.* 340 U.S.

931 (1951) and *United States v. Cooper*, 277 F.2d 857 (5th Cir. 1960).

B. SPECIFICATION OF ERROR NO. 2
TESTIMONY OF JOHN L. VAUGHAN
(App. Br. 38-41)

The testimony as to value of Mr. Vaughan was properly stricken on several grounds:

1. His entire method was to determine what a dam builder *could* pay, not what a willing buyer *would* pay.
2. Even in determining what someone *could* pay, he misused an FPC brochure which set forth what amounts were carried in the land and land rights accounts on several federal and non-federal projects. These lump sums included a non-segregated pot pourri of items, such as sums paid for relocation of railroads and highways, condemnation judgments, attorney fees, appraiser fees, clearing costs, and even court costs.
3. The opinion as to value expressed by Mr. Vaughan rested on inadmissible hearsay.
4. He based his value on the incorrect assumption that the PUD rights carried with them the right to divert and store the waters of the Pend Oreille River, the right to use federal lands and most other perquisites of a Federal Power Commission license.
5. He stated that it was essential, for his "bundle of rights" theory to apply, for the dam builder who would construct high Z Canyon to have the right of condemnation.

6. His value testimony related solely to a possible high dam at Z Canyon, which the court found could probably not be constructed, without assuming that the developer had a power of condemnation.

We shall discuss these grounds in the order set forth above.

1. The Test Is What a Buyer *Would* Pay, Not What He *Could* Pay

One fundamental fallacy of Mr. Vaughan's testimony as to market value was that it was based on an analysis of what a dam entrepreneur could pay for the PUD's property rights and still have a feasible project. To understand Mr. Vaughan's testimony it is necessary to consider the state of the PUD's proof when Mr. Vaughan commenced his testimony. It had first of all, through Mr. Allen, introduced evidence, over the City's objection, as to the capacity and cost, excluding financing and land and land rights, of a hypothetical high dam to be constructed at Z Canyon. (See Ex. D. 130-A). It next, through Mr. Stenson, put into the record, again over the City's objection (R. Tr. 756-757) an estimate as to the total financing costs for the high Z Canyon project postulated by Mr. Allen. Mr. Stenson came up with a total bond issue for high Z Canyon of \$77,600,000 (R. Tr. 778) exclusive of land and land rights and relocation costs. (R. Tr. 787). Mr. Stenson also gave his opinion as to the cost of power from the project described by Mr. Allen, assuming the financing costs estimated by Mr. Stenson. (R. Tr. 779).

At this point the PUD produced Mr. Vaughan to testify as to the "bundle of rights" owned by the PUD. Included in

this "bundle of rights" thought by Mr. Vaughan to be owned by the PUD was the right to use the federal domain:

"Since it is necessary to appraise the right to build the hydroelectric dam, which is created by these rights, there are several approaches which can be considered." (R. Tr. 1080).

If there were any doubt that Mr. Vaughan considered the use of federal lands, which comprised more than one-half of the reservoir area (Tr. 88-89), as part of the PUD's property for valuation purposes, it was dispelled by the following testimony:

"Q Your assumption was, I take it, that anybody with the privately owned lands necessary to construct the project, could get the use of the Federal land, upon making a proper application, assuming that he had a feasible project and therefore he would not have to include in his land and land rights cost, the value of the Federal lands involved.

A That is right.

Q So that, following that same reasoning, it wouldn't make any difference how much or how large the overall Federal ownership was in the particular project area, as long as there was some private property, and the man who owned that some private property would have the necessary bundle of rights.

A Yes.

Q If, for example, the Federal owned land in the area constituted 99% of all the land and land rights necessary to construct this Federal Project, and the privately owned interests in the reservoir area was 1%, you would value that 1% interest with this bundle of rights approach, and arrive as a value similar to that which you have arrived at for the PUD property in this case?

A Yes." (R. Tr. 1210-1211).

To bridge the gap between Mr. Stenson's figure of total project costs, exclusive of land and land rights, and *total* project costs, Mr. Vaughan made "a judgment allowance" of \$100,000 to pick up the remaining non-federal rights. (R. Tr. 1211). In arriving at this figure he relied upon a figure given to him by Mr. Oberbillig, a previous witness, (R. Tr. 1212) whose testimony on this subject had been held inadmissible. (R. Tr. 1056-1058). In doing this, Mr. Vaughan was basing his opinion on facts and opinions not in evidence, a practice held improper by this court in *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (1957).

In any event, Mr. Vaughan then proceeded to describe his valuation procedure, which centered around a Federal Power Commission publication called "Hydro-electric Plant Annual Construction Costs and Production Expense, Fifth Annual Supplement, 1961". From the statistics given in this publication, he selected a group of four plants upstream from the reach in question. These were Albeni Falls, a federal plant; Cabinet Gorge and Noxon Rapids, owned by the Washington Water Power Company and Box Canyon, owned by the PUD. (R. Tr. 1098, 1188). From the PFC publication he extracted those portions of the land and land rights accounts charged to power production. He recognized that some unidentified person had made some allocation in charging costs to power, storage and other uses, on some unknown basis. (R. Tr. 1199). He also extracted from the publication the total costs of the plants and annual production of energy. From this he developed a figure for land acquisition costs as a function of kilowatt hours of energy produced in a year.

(R. Tr. 1083). He then used this figure to arrive at a cost which a developer *could* pay for high Z Canyon land and land rights, based on the estimated production of a hypothetical plant.

Mr. Vaughan described his methodology:

“Q As to this document, as I understand it, you took the number of plants at arriving at a composite figure which utilized the per cent of overall cost, represented by acquisition of land and land rights?

A Yes.

Q You reduced that to cost per kilowatt hour of energy produced by a plant over a period of a year?

A Yes.

Q Then you took that per kilowatt hour figure and applied it to the figure which the Harza Engineering Co. showed the High Z could produce, and using that same percentage figure you arrived at your conclusion as to the value of the land?

A No.

Q Would you explain that last, please.

A This is related to the investment, the original cost of plant, not to the cost of generation.

Q It was original cost of plant per kilowatt hour?

A Generation.

Q Of generation?

A Yes.

Q So that you took the kilowatt hour of generation which Harza indicated could be produced by a High Z, and using the factor which you had previously arrived at for the other plants, simply applied that factor in arriving at a land value, for the land under the High Z?

A To the entire bundle of land rights.”
(R. Tr. 1187-1188).

Mr. Vaughan then made another calculation in which he used the land and land rights accounts of the Brownlee, Cabinet Gorge, Chief Joseph, The Dalles, Davis, Hungry Horse, McNary Lock, Noxon Rapids and Upper Baker projects. (R. Tr. 1189). This time he developed a figure from the FPC material for “total investment in hydroelectric facility as a function of the name plate capacity.” (R. Tr. 1083-1084). Presumably Mr. Vaughan was referring to total investment in land and land rights as reflected by the FPC account in question. (R. Tr. 1189-1190).

Out of the foregoing Mr. Vaughan somehow arrived at a figure of \$34,000,000. (R. Tr. 1205). Then, for reasons he did not explain, he reduced this to \$8,800,000. Finally, he reduced that to \$8,700,000 to account for his “judgment allowance” of \$100,000. (R. Tr. 1205). The fundamental objective of Mr. Vaughan’s methodology was thus to determine what a dam builder could pay for Z Canyon land rights, based upon the economics of the hypothetical project testified to by Messrs. Allen and Stenson.

2. Misuse of FPC Brochure

When Mr. Vaughan’s testimony was completed, it was obvious that he had simply taken a number of plants at random, including multipurpose projects, and arrived at a composite figure which utilized the per cent of overall cost represented by a certain FPC account. He took those figures from a hearsay document. What is worse, the criteria used by

the unidentified compilers of the brochure were not shown. For example, the basis upon which judgments were made as to proper allocation of land costs between power and other uses, such as storage and flood control, was unknown to Mr. Vaughan. (R. Tr. 1198-1199).

This court had before it a somewhat similar issue in *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167 (9th Cir. 1962). That case involved the condemnation of a Wherry Housing Project. A government appraiser sought to arrive at a conclusion as to fair value by deriving a composite figure from a number of other Wherry projects. He apparently made no effort to determine whether the individual projects selected for comparison were in fact comparable. His position was that it was immaterial whether the projects were built of brick, wood, stone or stucco or where they were located. He used as his sole criterion capitalization of the incomes of these various projects. This court held that the evidence was properly excluded, since the other projects were not shown to be comparable.

In the instant case, Mr. Vaughan offered no explanation whatsoever as to why he had selected the projects he did for comparison with the hypothetical project at Z Canyon. Very similar to the appraiser in the *Fairfield Gardens* case, Mr. Vaughan used as a sole criterion of comparability the ratio between investment in an ill defined FPC account, Land and Land Rights, with total production or capacity. Perhaps the government appraiser in *Fairfield* had some direct or admissible hearsay knowledge of the costs of the

other Wherry projects. But Mr. Vaughan testified that he did not even know whether the cost allocations as to use were made by the dam proprietors or by the Commission. (R. Tr. 1199-1201). He merely testified that since the allocations were made "that there must be some reasonable assumption of the validity of them." (R. Tr. 1200). He was hazy as to just what the relevant FPC account included, but believed it included relocation of highways, relocation of roads, survey costs, clearing costs (R. Tr. 1202-1203) and supposed that there were also included condemnation costs, including court costs and counsel fees. (R. Tr. 1208).

In argument of the City's motion to strike (R. Tr. 1265) counsel for the City showed what a meaningless exercise Mr. Vaughan's use of the FPC brochure was by pointing out that Hungry Horse, one of the projects used by Mr. Vaughan, was shown in the FPC brochure as having \$55,050,000 in the land and land rights account. Yet Hungry Horse is a Bureau of Reclamation project located entirely within a national forest. (See Exhibit 28 as to location). Hungry Horse, on the other hand, a tremendous storage project, undoubtedly involved huge relocation costs. Just who decided how much of the relocation should be charged to power and how much to storage, and what considerations went to make up this judgment the record does not disclose. Moreover, Mr. Vaughan used an FPC land account, which included relocation and clearing costs, to compare directly with Z Canyon. Yet he disregarded necessary relocations and clearing costs in evaluating Z Canyon as a dam site. (R. Tr. 1205).

Another fatal flaw which inheres in Mr. Vaughan's use of the FPC brochure is that by using the figures there set out for land and land rights, he has violated the well established rule that transactions which involve sales to agencies possessing the right of condemnation are presumptively inadmissible because they do not reflect market value. See cases gathered at 85 A.L.R. 2d 110, 163-173 (1962).

By using the FPC brochure, Mr. Vaughan attempted to use on a wholesale basis transactions which, if presented individually, would not be admitted. Mr. Vaughan did not discriminate, nor do the FPC statistics, between parcels acquired for the other projects by voluntary negotiation, negotiation under threat of condemnation, settlement after commencement of condemnation proceedings or awards by juries. If an individual transaction, say at Albeni Falls, where a jury awarded a given amount for a dairy farm under condemnation, would not be admissible as a comparative sale, how could a composite statistic be admissible which included the court costs, appraisers fees, survey fees and attorney fees for that and perhaps a hundred other diverse transactions?

3. Mr. Vaughan's Opinion Rested on Inadmissible Hearsay

An appraiser must of necessity base his opinion as to value on hearsay. In the instant case, the court ordered the exchange of "comparables" 45 days before the trial, so that the statistics of individual transactions might be verified. (R. Tr. 46-48). The trial judge indicated the proper scope of the exception, by his ruling, not appealed from here, sustaining an objection to the testimony of the PUD's witness, Mr. Ober-

billig, that he had talked to someone in the "Land Office" who told him that certain mining claims were mined out and thus valueless. (R. Tr. 1013-1015). The proper way to prove a transaction, or group of transactions, to be relied upon by an expert as to value, is either (1) to put the sellers and purchasers on the witness stand or (2) to put on a qualified appraiser who has seen the properties, has talked to the principals to establish the voluntary aspect of the sales and has verified the transactions by public records. In contrast, Mr. Vaughan placed reliance on statistics of which little was known. The publication was not self-explanatory. It did not adequately explain who made the judgments as to allocation, on what basis they were made, or what was included in the broad classification, Land and Land Rights. Under these circumstances the statistics were not properly authenticated and were hearsay of the most obvious type. Accordingly, the City objected on that ground. (R. Tr. 1262-1263).

4. Mr. Vaughan's Appraisal of Right to Build a Dam

On direct examination Mr. Vaughan stated that it was "... necessary to appraise the right to build the hydroelectric dam." (R. Tr. 1080).

On cross, he stated again the real subject of this appraisal:

"I have appraised this as a right to build an existing hydroelectric dam as planned..." (R. Tr. 1131-1132).

The trial judge commented repeatedly that Mr. Vaughan thereby assumed all license rights in the PUD:

"THE COURT: This man has assumed, in valuing this property, that the person who was buying it had a

license, or could get a license, without any trouble.

* * *

“He valued the property as though there was a license for a Z Canyon, so if he is going to assume that evaluation, – counsel, I am concerned about all of this testimony, . . .” (R. Tr. 1226-1227).

Later on, in ruling on the City’s motion to strike, the court said:

“Now, it was my understanding that the valuation that was to be placed on this property for power site purposes was a valuation without a license, without the right at the present time to build and construct a powerhouse, without the right to divert the flow of water for the purpose of developing a hydro energy, and without the right to dam up the river and create a reservoir and back up the water and convert the flow of the river to the use of the condemnee, the PUD, what somebody would pay for the power site as a power site, without those things, having to go out later on and get them.

“I don’t think this witness’ testimony, counsel, is based upon an acceptable theory of valuation, so I feel I must grant the motion to strike the testimony, so I grant the motion.” (R. Tr. 1282).

The hurdles which the PUD, or a purchaser from it, would have had to overcome to acquire the right to construct a dam were:

1. It would have had to obtain an FPC license, which would have involved a showing that the proposed project satisfied all of the requirements of the Federal Power Act. For example, it would have had to show a market for the output of the project, a requirement the PUD itself did not in fact meet. (26 FPC 56, 464.)

2. Sixty to seventy per cent of the uplands necessary for

a Z Canyon project were federally owned. (Tr. 89). The right abutment of the Z Canyon dam site was on federal land. (Ex. P. 80A). The problems which the presence of these federal lands would have posed to a prospective developer of Boundary or Z Canyon were not limited to the direct necessity of obtaining an FPC license. The Department of the Interior, which had jurisdiction over the land in question, expressed, through its Secretary, its unqualified opposition to the construction of any dam in the Boundary-Z Canyon reach of the river. (26 FPC 74). Federal opposition to the project went back at least to 1949. (26 FPC 73).

3. No person or agency could construct a project at Z Canyon without acquiring a bundle of rights and permits from the State of Washington. The PUD, through its purchase from Cooper, obtained certain shorelands in fee and rights to overflow other shorelands. These rights had no value for power site purposes unless the owner also had rights from the State of Washington:

- (a) to overflow the *bed* of the Pend Oreille River,
- (b) To continuously divert and appropriate waters of the Pend Oreille River for power purposes under state law, and
- (c) to impound water in a reservoir.

By the time of the trial, Seattle had obtained these rights. (Ex. P. 21, Tr. 90-91). As shown by the recitals in Ex. P. 21, the State held Seattle's applications in abeyance pending final judicial vindication of its right to condemn. It is thus doubtful whether the PUD or a purchaser from it could

have obtained these permits absent a clear-cut power of condemnation.

4. Any developer would have had to overcome the unqualified opposition of the Pend Oreille Mines & Metals Co., owner of scores of mining properties in the reservoir, (see Ex. P. 40 and 41), to any dam other than possibly a low dam at Z Canyon. (R. Tr. 1582-1596). (Also see Ex. P. 42-52, rejected by the court, R. Tr. 1626).

5. Any developer would have had to face the unqualified opposition of the Bunker Hill Company and its affiliates, including Metaline Contact Mines, (R. Tr. 403-410, R. Tr. 1687), owners of extensive mining properties adjacent to the Pend Oreille River, between Z Canyon and Slate Creek, to any power project in the Boundary-Z Canyon reach of the river, including a low dam at Z Canyon. (R. Tr. 1672, 1663, 1670, 1678; Ex. P. 58-76, especially Ex. P. 72; also see Ex. P. 42-48, rejected).

6. Other private property owners were against the construction of any project, including a low dam at Z Canyon, and would not sell voluntarily. (R. Tr. 410-414, Tr. 88).

Under the foregoing facts, to value the PUD's rights as a power site would be to indulge in the wildest speculation. On this point, *United States v. Cooper*, 277 F.2d 857 (5th Cir. 1960) appears to be directly in point. There, the question presented was whether an award for reservoir lands should include any consideration of its use as a potential dam site. Just as here, with respect to a high dam at either Boundary or Z Canyon, the court held:

"We conclude that there was a complete failure of proof that there was a reasonable probability that this land would be used for a dam site within the reasonably near future by any one other than the Federal Government . . .

* * *

"The only testimony on this issue was given by Mr. B. M. Hall, Jr., a qualified hydroelectric engineer . . .

* * *

"However, in addition to proof that the land offered a site on which it would be *practicable* to build a dam for the creation of hydroelectric power, it was incumbent on the plaintiffs to prove that there was also a *reasonable likelihood* that it *would* be so used in the *reasonably near future*." . . . (Citing cases).

* * *

"An expert witness may give his opinion based on assumptions stated by him. However, if the assumptions needed to support the opinion are not proved, or at least testified to, and are not otherwise taken to be true, the opinion is worthless . . .

* * *

" . . . moreover, it was not suggested that all the property could be acquired by private negotiation at any price, much less at a commercially feasible one, without the necessity of resorting to the power of eminent domain. Certainly, there was nothing before the jury that would permit it to find that the lands would be likely to be assembled without use of eminent domain.

* * *

"The record here discloses that the evidence actually submitted fails to provide more than a basis for speculation by the jury, a thing which the Supreme Court in the Olson case said was "to be condemned in business transactions as well as in judicial ascertainment of truth." (277 F.2d 857, at 859-862).

The speciousness of Mr. Vaughan's "bundle of rights" theory, as applied to the PUD's property, is demonstrated further by the difficulties Mr. Vaughan had in postulating a

feasible project on the PUD lands and in saying one could acquire the remaining private lands in the reservoir without paying power site value for other dam sites upstream.

Mr. Vaughan testified that for his "bundle of rights" theory to apply, the owner would have to own the property on which the powerhouse would be constructed. (R. Tr. 1171). This was on Thursday afternoon. The design drawings for Z Canyon which had been introduced by Mr. Allen of Harza Engineering Co. showed the powerhouse on the east side of the river on private property. (Ex. D. 130A). No court was held on Friday. On Monday, Mr. Vaughan expressed the opinion that the powerhouse could be built on either side of the river. (R. Tr. 1219). He stated that he had ignored, in applying his bundle of rights theory, the fact that Mr. Allen had designed a project with the powerhouse on the east side. (R. Tr. 1220). Monday afternoon, Mr. Allen was recalled to state that he had redesigned the Z Canyon project over the weekend (R. Tr. 1303) to move the powerhouse across the river so that it would be safely on PUD property. (R. Tr. 1288). The relocation, to keep it on PUD property, did not provide for future expansion of the powerhouse. (R. Tr. 1296, Ex. D. 142). Yet Mr. Allen had stated on his original direct examination that the FPC always requires that future expansion be provided for in power plant design. (R. Tr. 674).

Still another inconsistency in Mr. Vaughan's approach was his failure to take into account the fact that the project boundaries for a high Z Canyon project would include two dam sites, Slate Creek and Deadman's Eddy, upstream in

the reservoir, both on private property. (See Ex. P. 27, D. 137 as to private ownership). These sites had been proposed to the FPC by the District. (See 26 FPC 114-115, 133, 135, 137). Mr. Vaughan testified that he was aware neither of the Slate Creek site nor the Deadman's Eddy site. (R. Tr. 1130-1141). Obviously, if Mr. Vaughan's bundle of rights theory were tenable as to the acquisition by the City of the upstream Z Canyon site, the theory would apply to the acquisition by the PUD, or one who bought from the PUD, of the Slate Creek and Deadman's Eddy sites. Yet Mr. Vaughan had not taken that factor into account in his \$100,000 judgment figure. (R. Tr. 1132-1141). He stated that if plans were drawn for Slate Creek or Deadman's Eddy and they showed development to be feasible, he would consider applying his "bundle of rights" theory, "but unless there is a right to build a dam in that location, I don't see how it can have any basis of valuation." (R. Tr. 1142). This statement was a clear recognition by Mr. Vaughan that his astronomical values derived from "a right to build a dam". His mistaken idea that the PUD owned "a right to build a dam" permeated his entire testimony.

5. Necessity of Right of Condemnation

Mr. Vaughan testified that in forming his opinion as to value, he assumed in the developer the right of condemnation:

"A I have repeatedly stated that the basic assumption was that anybody who got the permit had the right of condemnation, and I think that is the fact.

Q In any event, that is an essential element, is it not, in your utilization of the bundle of rights evaluation approach?

A Yes.” (R. Tr. 1176-1177).

As we have already pointed out, if in assessing a power site and reservoir as an entity it is necessary to consider that the owner must resort to condemnation to put the package together, the property may not be valued as a power site. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943). The rationale of the *Powelson* and other cases applying this principle is that neither the federal government nor any governmental agency need compensate a landowner for loss of a right to resort to a condemnation power.

6. Mr. Vaughan's Stricken Testimony Would Have Had No Practical Effect in View of Findings Entered By the Court

We have already pointed out that the rejected testimony of Mr. Allen as to Boundary project (Specification of Error No. 1) would have had no legal effect, if it had been admitted, in view of Finding XI (Tr. 88) not attacked on this appeal. The testimony of Mr. Vaughan, stricken by the court, related solely to value based on use of the properties for a high dam at Z Canyon. (R. Tr. 1097). In Finding XI the court held that a developer of high Z Canyon “could probably not acquire all of these [remaining] properties by voluntary transfer if it be assumed that such developer did not have the power of eminent domain.” The PUD thus did not carry its burden of showing, by a preponderance of the evidence, that it was reasonably probable that its property could be devoted to a high Z Canyon project in the reasonably near future. Absent such a showing, Mr. Vaughan's rejected testimony was

“worthless” because it was based on an unproven assumption.
United States v. Cooper, 277 F.2d 857, 862 (5th Cir. 1960).

C. SPECIFICATION OF ERROR NO. 3
TESTIMONY OF NEVILLE C. COURTNEY
(App. Br. p. 41-45)

Several grounds support the court’s action in striking Mr. Courtney’s testimony as to value:

1. Mr. Courtney picked \$7,500,000 as a point off a graph to show what a dam builder *could* feasibly pay for the PUD’s lands.

2. His valuation presupposed that a federal license to build and thus use of federal lands was somehow automatically appurtenant to the PUD lands, and that the PUD, moreover, held state derived rights to divert and store the waters necessary to operate a reservoir.

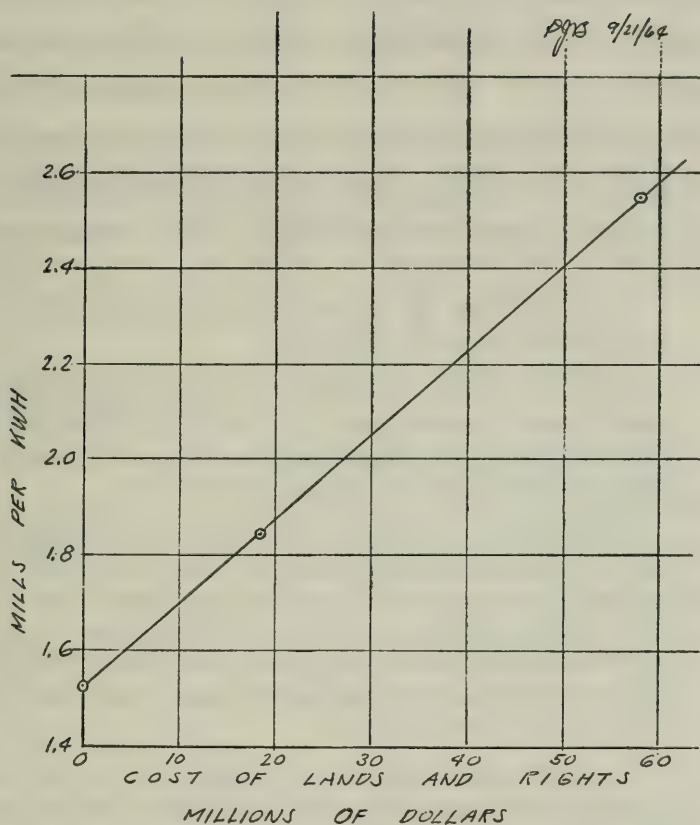
3. He made no analysis and had no comprehension of the problems involved in acquiring the remaining private rights to construct a reservoir.

In addition, as with the testimony of Messrs. Allen and Vaughan, Mr. Courtney’s stricken testimony could not have affected the outcome of the case. His valuation was based, in major part, on the unproven assumption that the PUD could build a high dam at Z Canyon without resorting to condemnation. (R. Tr. 1457-1460). For example, in reaching his \$7,500,000 figure, he relied upon a report that the project would have a capacity of 550,000 kilowatts, which was the

estimated capacity for Mr. Allen's high dam. (R. Tr. 1396, Ex. D. 130A, p. 2, 6, 7).

1. Mr. Courtney's Use of the "Bleifuss Graph"

Mr. Courtney's value of \$7,500,000 (R. Tr. 1398) was derived from use of a graph, similar to one presented by a previous PUD witness, Mr. Bleifuss, and rejected by the court. (R. Tr. 850-851, 858). Mr. Courtney did not present his graph as an exhibit. However, since his description of the graph he used corresponded with Mr. Bleifuss' graph (Ex. D. 134, rejected), we have reproduced Mr. Bleifuss' exhibit in this section of the brief. By looking at this graph the court can fully understand Mr. Courtney's method of valuation.



Z - CANYON
COST OF ENERGY
vs.
COST OF LANDS & RIGHTS

Mr. Courtney first said he assumed the figures for cost of energy per kilowatt hour computed by Mr. Stenson, an earlier PUD witness, for the costs of a hypothetical plant without land and land rights. He then added a round half million to take care of additional private property acquisitions for the reservoir. (R. Tr. 1459, 1446). He then described his novel method of valuation, which he called "the cost method" which was based on how much could be paid for the property without affecting the economic feasibility of the overall project:

"I got 2.4 that he [Stenson] had established in mills per kilowatt-hour for no land.

I went up to the 10 million line and I established or found that it would take 2.63 mills per kilowatt-hour. Then I went up to the 20 million line and I found that that would be 2.86 mills per kilowatt-hour.

Now, when I got those curves, I could readily see that adding as much as 20 million dollars into this project for land, the cost would be under 2 mills for High Z Canyon, and it would be under 3 mills for Low Z Canyon. My conclusion immediately there was that it was an extremely valuable computation by using the cost, which I will call the cost method.

I used my judgment as to what point on this curve I should adopt as my fair market value. I knew several things from experience about how much the land would cost, in general, in relation to the cost of the total project, and I finally came down to a final answer that with seven and-a-half million allowed for land, the cost of the power would only be 1.69 mills per kilowatt-hour, and, likewise, if I went over to the Low Z, it would – I haven't that line on here, but it would be approximately, oh, about 2.6 mills per kilowatt-hour." (R. Tr. 1459-1461).

The court commented on Mr. Courtney's method of deriving "market value" from a graph:

"My understanding of the last testimony was that in making up this graph, he added an amount in for land and land rights, and he arrived at a place where it looked like \$7,500,000 was a pretty good figure, and that is the value that they put on it." (R. Tr. 1471-1472).

The court asked counsel for the PUD:

"The Court: ...

to base your valuation on what could be paid by somebody and still come out on the basis of the production of electricity, presupposes the issuance of a license, the construction of the plant, the assembling of all the property and the production of electricity at X mills per kilowatt, isn't that right?" (R. Tr. 1484-1485).

2. Use of Federal Lands and State Water Rights in "Bundle of Rights"

It is evident, quite apart from Mr. Courtney's "graph" testimony, that he assumed that much of the value of the PUD lands derived from use of the federal lands, which comprised most of the reservoir acreage. Yet use of this acreage would depend on the granting of an FPC license. This prompted the following exchange between the court and counsel for the PUD:

"THE COURT: You say he will get the government land if he has a license. Aren't you valuing this land, isn't he valuing this land as if he had a license?"

"MR. DILL: No, he did not.

"THE COURT: I know he said he didn't, but what would he value it at if he had a license?"

"MR. DILL: Well, that is another matter.

"THE COURT: Well, in my humble judgment, that is the way he has valued this land." (R. Tr. 1481).

Mr. Courtney's figure of \$7,500,000 actually included a

large but undefined amount for the right to use federal land.
He testified:

“Q Does the figure that you gave us of \$7,500,000, represent your opinion as to the value of the dam site and reservoir as an integrated whole?

A Yes.” (R. Tr. 1416).

* * *

Q My question is, whether in stating your figure of \$7,500,000, whether that is for the overall or unitary value of the dam site and reservoir?

A That is the value for the whole reservoir and dam site.” (R. Tr. 1417).

If this theory were carried to its logical extreme, an easement, such as the PUD had for entry to a gaging station, would be worth many millions of dollars, assuming that all of the remainder of the lands necessary for a reservoir were in the federal domain. The easement would represent the entire bundle of non-federal rights necessary to construct the project and would thus, under the PUD's theory, be worth millions.

Mr. Courtney assumed in his valuation not only the right to use federal lands but also that the PUD could convey state permits, it did not have, to divert and store the waters of the Pend Oreille River. Mr. Courtney testified:

“Q You said, I believe, on direct examination – did you assume that the PUD ownership was of the land and land rights acquired in green on that map? [Exhibit D. 109].

A Yes, from there on up to Box Canyon.

Q Did that include any right to store the water of the Pend Oreille River?

A It was my understanding that it did.

* * *

Q In your consideration of this defendant's exhibit 109, you included the right to divert the waters of the Pend Oreille River through Penstocks or intake structures?

A Yes." (R. Tr. 1423).

Mr. Courtney's assumption that the PUD's right to overflow shorelands included the right to divert and store the waters of the Pend Oreille River was erroneous. Even the PUD in its brief does not quite argue that is acquired *water* rights when it acquired the easement to overflow shorelands from Mrs. Cooper. (App. Br. 52-55). However, because of Mr. Courtney's mistaken assumption and what seems to be confusion in the PUD's brief between land rights and water rights, we shall summarize the applicable facts and legal principles:

1. As the court will see from the language of the 1907 Washington statute quoted at page 99 of the Appendix to the PUD's brief and of the permit given Cooper's predecessor by the State, the right given is to *use the shorelands* for certain purposes, namely, "to perpetually back and hold water upon and over the land hereinafter described, and to overflow any such land and inundate the same..." (Ex. P. 1). This by its terms is an easement to use state land, not a right to appropriate, divert or store water.

2. Section 27 of the Federal Power Act (16 U.S.C. § 821), quoted by the PUD on page 54 of its brief, protecting certain state vested rights, relates to the "control, appropri-

tion, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." It does not refer to rights in property, but in the use of water. Thus in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 176 (1946) the Court explained the scope of Section 27:

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."

3. If the PUD as owner of shorelands were regarded as a riparian owner, such status would not carry with it any right to the use of the waters of the Pend Oreille River. It is well established in the jurisprudence of Washington that riparian rights do not exist in navigable waters. It was first so held in *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891). *Eisenbach* has been followed in an unbroken line of authority. In an article entitled *Washington Water Rights – A Sketch*, 31 Wash. L. Rev. 243, 246 (1956), the author, Professor Arval A. Morris stated:

"...Riparian rights do not exist in navigable water courses,..."

Also see *Port of Seattle v. Oregon and Washington Railroad Co.*, 255 U.S. 56, 66-67 (1921).

4. The PUD states (App. Br. 53) that before enactment in 1917 of a code in Washington establishing appropriation rights and procedures, no appropriation was necessary to establish a right to build a dam on the Pend Oreille River. This is incorrect. Chapter CXLII of the Session Laws of 1891 (p. 327) provided a statutory system of appropriation whereby "...as between appropriations the first in time is first in right." This statute is quoted at Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 Wash. L. Rev. 197, 203 (1932).

There is no showing that any predecessor in interest of the PUD ever appropriated the waters of the Pend Oreille River before the passage of the 1917 Water Code, or at any time. Thus the predecessors of the PUD had no water rights which vested before the passage of the Washington Water Code in 1917 or the Federal Power Act in 1920.

In view of the foregoing principles, Mr. Courtney proceeded on a basically incorrect premise when he assumed that the PUD owned the right to appropriate the waters of the Pend Oreille River for power purposes.

3. Failure to Evaluate Acquisition of Remaining Property

Mr. Courtney failed to evaluate in any meaningful way the amount which a dam proprietor would have had to pay for acquisition of the remaining non-federal rights in the area. Mr. Courtney used a judgment figure of \$500,000 to clean up the remaining rights in the reservoir. (R. Tr. 1432, 1445). He had no breakdown of this figure (R. Tr. 1429),

nor could he tell what project boundaries he had assumed. (R. Tr. 1430).

The \$7,500,000 figure was not obtained, as one might assume, on the basis that a dam builder would pay \$7,500,000 for the PUD rights and another \$500,000 for the balance of the non-federal property. (R. Tr. 1433). It will be recalled that Mr. Vaughan came to a figure of \$8,400,000 for total land value, and then deducted \$100,000, a judgment figure for private acquisitions. Mr. Courtney did not do this:

“Q Do I assume, then, that you came to some figure at some stage in your calculations of 8 million dollars and then reduced it to 7 million, five?

A No, no, no, no. That is not it at all. No, I have never had a figure in my mind of 8 million.” (R. Tr. 1433).

One might reasonably ask how he could arrive at the figure of \$7,500,000 without making some deduction of \$500,000. Maybe the explanation lies in his agreement with the statement that the figure of \$7,500,000 represented the value “of the dam site and reservoir as an integrated whole.” (R. Tr. 1416). If it did, then Mr. Courtney should have reduced his figure to \$7,000,000. But Mr. Courtney made no explanation of this. Nor did his estimate of \$7,500,000 include the cost of necessary relocation of mine facilities. (R. Tr. 1434). Yet the matter of mine relocation is not something which someone could reasonably overlook. Impounding of a reservoir to an elevation of 1990 feet above sea level would directly flood the Pend Oreille Mine unless certain facilities were modified. (R. Tr. 1575). When asked

whether he knew that Seattle had been required by FPC in its order, published in 1961, to relocate mine facilities, he replied:

“I wouldn’t be at all surprised.” (R. Tr. 1435).

D. SPECIFICATION OF ERRORS NOS. 4, 5 and 7
(App. Br. 45-46, 49)

These specifications appear to be purely formal, with no argument of substance and no citation of authority whatsoever. Since specifications 5 and 7 are not argued separately from other contentions, we make no separate reply.

In specification 4 the District states that it was incumbent upon the City, after the PUD’s evidence was stricken, to put in additional evidence of value. The PUD contends that Seattle’s witnesses ignored power site value. (App. Br. 45). This is incorrect. Messrs. Butler and McQuigg inspected numerous hydro plants in the Northwest and analyzed many transactions in connection with the property acquired for the projects. (R. Tr. 90-97, 250-257). They considered very carefully the possibility that lands in reservoirs might bring a premium on such account. They found no such increment in value to have been paid for uplands or shorelands. (R. Tr. 97, 119, 248). One of the City’s witnesses as to value, Mr. Butler, had had extensive past experience in appraising properties to be used in reservoirs (R. Tr. 82), and presented data concerning comparable transactions, including properties used for abutments of large dams. (R. Tr. 109-120).

After a thorough analysis of the subject, Messrs. Butler and McQuigg concluded that the adaptability of the PUD’s

property for reservoir purposes did not enhance its value for its otherwise highest and best use, reforestation. (R. Tr. 134, 241).

POINT II

PUD IS NOT ENTITLED TO SEVERANCE DAMAGE SPECIFICATION OF ERROR NO. 6

(App. Br. 46-48)

The PUD contends that the trial judge erred in rejecting, in pretrial proceedings, its claim to severance damages and states that this error was compounded by his refusal to hear evidence in support of the claim.

First, we should consider what the PUD means by severance damages. Part of its upland tract was taken. Conceivably there could have been damage to the portion not taken. But the PUD's own witnesses testified that this tract was worth as much after the take as it was before. (Vaughan R. Tr. 1097, Courtney R. Tr. 1399).

The PUD's theory of severance was that it was entitled to be compensated, as its counsel put it, for backing up the water on Box Canyon. (R. PCF 50, 62-64). In its pretrial contentions, which were rejected by the court, the PUD sought compensation for the backwater effect which the Boundary project would have on the Box Canyon project. (Tr. 46).*

*Diminution in output of an upstream project by the overlap of a downstream hydroelectric project was considered in *Public Utility Dist. No. 1 of Douglas County v. FPC*, 242 F.2d 672 (9th Cir. 1957).

The parties reached an agreement on December 20, 1965, after the filing of the PUD's opening brief, settling the matter of compensation to be paid the District for encroachment. The parties have stipulated that this court may consider the agreement on this appeal. A copy of the stipulation and agreement is attached to this brief as Appendix "A". The court's attention is invited to the following paragraph:

"6. Upon the properly authorized execution of his agreement by the parties hereto, the claim made by PUD in the aforementioned condemnation action with reference to the destruction of production capacity of Box Canyon Dam by reason of encroachment by the Boundary Project Reservoir and referred to above shall be deemed settled and eliminated from said condemnation action without prejudice to any and all other claims and contentions asserted by PUD in said condemnation action..."

In view of the foregoing agreement and in view of the uncontroverted testimony that no damage was incurred to the remaining part of the PUD's uplands by reason of the partial taking, we are unable to divine any issue remaining in the case relating to "severance". Any damage beyond encroachment loss or damage to the remaining uplands would be damages for the fact that the Federal Power Commission decided to license Boundary to the City, rather than Z Canyon to the District. Clearly, it was the order of the FPC and not the taking of the PUD's properties which prevented the District from constructing the Z Canyon project and integrating its operation with Box Canyon.

In the *Grand River Dam Authority* litigation, referred to repeatedly in the PUD's brief, the Authority proposed a three dam development of the Grand River in Oklahoma. The Grand River, itself, was not navigable, but its flow affected the navigable Arkansas River. The United States determined to develop one of these sites. The Authority claimed that it was entitled to compensation for dam site value and also severance damages to its two upstream projects. The Court of Claims held that it was entitled to compensation for its water power, which holding was reversed by the United States Supreme Court. However, on the issue of severance damages the Court of Claims said in *Grand River Dam Authority v. United States*, 175 F. Supp. 153, 157 (Ct. Cl. 1959):

“As to the items of severance damages, we believe that these were in the nature of indirect or consequential damages and therefore not compensable. *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644; *Omnia Commercial Company v. United States*, 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773.”

In its reversal of the Court of Claims holding that the Authority was entitled to compensation for the taking of water power, the United States Supreme Court said, in *United States v. Grand River Dam Authority*, 363 U.S. 229, 233 (1960):

“...When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one. Plainly under our decisions it could license another to build the project and operate it. *If respondent*

sued for damages for failure of the Federal Government to grant it a license to build the Ft. Gibson project, it could not claim that something of right had been withheld from it. So it is when the United States exercises its prerogative by building the project itself." (emphasis supplied).

It, therefore, follows that the PUD may not do by indirection what it cannot do directly, namely, recover compensation for the exercise by the United States of its sovereign prerogative granted to it by the Commerce Clause of the Constitution, Article I, Sec. 8, cl. 3 Also see *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

The PUD's claim for "severance" is, moreover, essentially a claim for damages for frustration of its business plans to construct Z Canyon. The United States Supreme Court passed on a closely analogous point in *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). There, as we have seen, the Court overruled the Court of Claims and held that no compensation for power site value was payable because there was no taking of an existing power project, only a prospective project. The Court observed:

"The Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power. Here respondent has done no more than prove that a prospective business opportunity was lost. More than that is necessary as *Omnia Commercial Co. v. United States*, 261 U.S. 502, 67 L. ed. 773, 43 S Ct 437, holds. In that case the claimant stood to make large profits from a contract it had with a steel company. But the United States, pursuant to the War Power, requisitioned the company's entire steel production. Suit was brought in the Court of Claims for just

compensation. The Court, after pointing out that many laws and rulings of Government reduce the value of property held by individuals, noted that there the Government did not appropriate what the claimant owned but only ended his opportunity to exploit a contract. 'Frustration and appropriation are essentially different things.' *Id.* 261 US at 513. And see *Mitchell v. United States*, 267 US 341, 345, 69 L. ed. 644, 648, 45 S Ct 293; *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 US 266, 281-283, 87 L ed 1390, 1400-1402, 63 S Ct 1047. No more need be said here." (363 U.S. at p. 236).

Also see *Winn v. United States*, 272 F.2d 282 (9th Cir. 1959); *United States v. 561.14 Acres of Land*, 206 F. Supp. 816, 825-826 (W.D. Ark. 1962).

The PUD was made whole for any possible damage to Box Canyon by the encroachment agreement, Appendix "A" hereto. Its fanciful claim that it is entitled to something more on the basis that Box Canyon and Z Canyon were part of the same integrated plant and system was disposed of by the Federal Power Commission (26 FPC 65), and concluded against it by the District of Columbia Court of Appeals.

That court, in the direct review proceedings from the FPC orders, passed on the matter and held:

"... For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after

the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land." (308 F.2d 318, 323).

POINT III

PUD'S CASE FOR POWER SITE VALUE FAILED BECAUSE OF ITS FAILURE TO SHOW REASONABLE PROBABILITY OF DEVOTING PROPERTY TO RESERVOIR USE

In pretrial proceedings the District Judge ruled that he would permit the PUD to show that "in the reasonably near future it could utilize this property for power site purposes." (R. HPO 130). The judge reminded the PUD of this ruling during the argument on the City's motion to strike Mr. Vaughan's testimony. (R. Tr. 1281). The court entered findings to the effect that a developer of either the Boundary or Z Canyon site could not put the remaining properties together without condemnation, except for a Z Canyon project to a pool elevation of 1885 feet. (Tr. 88, 94-95).

The PUD does not challenge any of the court's findings in its specification of errors. Hence, it is accepted as verity on this appeal that the PUD could not be awarded power site value, in any event, except for such power site value as might inhere in the possibility of constructing a low dam at Z Canyon.

Any claim that a purchaser of the PUD's rights would pay for the "power site value" of low Z Canyon would be

pure speculation. Anyone who would buy the PUD property on the prospect of building a low dam at Z Canyon would be relying on the assumption that the Federal Power Commission would ignore its obligation to "promote the comprehensive development of the water resources of the nation..." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180-181 (1946). It is possible that the Commission might license a dam to be built in stages. But it seems unlikely in the extreme that the Commission would license a project at Z Canyon and thus destroy the irreplaceable water resource between Z Canyon and the Canadian border. There can be no doubt, as found by the FPC examiner, that the Boundary and Z Canyon sites are mutually exclusive. (26 FPC 61). The Commission confirmed the examiner's finding that Boundary project, to elevation 1990, was the optimum development of the reach of the Pend Oreille River from Box Canyon to the border. (26 FPC 54, 139-140, Finding 101). There is no market for the second best site in a navigable reach of a river, controlled by FPC, which is committed to full development by its charter, the Federal Power Act. The only reason the PUD acquired uplands at Z Canyon was because they happened to be included in a package of rights they needed for Box Canyon.

POINT IV

VALUATION METHODS USED BY GRAND HYDRO AND TWIN CITY APPRAISERS WERE NEVER JUDICIALLY APPROVED AND WERE, IN ANY EVENT, DIFFERENT THAN THOSE EMPLOYED BY PUD APPRAISERS

The PUD contends that it tailored its valuation testimony

to fit testimony of similar character in litigation known as the *Grand Hydro* and *Twin City* cases (App. Br. 57-63).

The PUD cites three opinions on page 61 of its brief relating to *Grand Hydro*. It then quotes from the two opinions of the Oklahoma Supreme Court (139 P.2d 798 and 201 P.2d 225), and from the opinion of the United States Supreme Court (335 U.S. 359) (App. Br. 61-62). None of these quotations constitutes an approval of the *methods* used by the appraisers. Rather, there is no discussion anywhere in any of the three opinions as to the methods used. The quotations indicate nothing more than a holding that *Grand Hydro* was, under the facts, entitled to power site value. The sole issue before the United States Supreme Court was whether power site value was payable. The Court held, 5-4, that it was. Nowhere, either in the United States Supreme Court opinion, or in the opinions of the Oklahoma court, is there any discussion of the propriety of the valuation *methods* used by any expert witness.

We turn now to the five opinions in the *Twin City* litigation cited by the PUD at page 58 of its brief. The PUD points out that ultimately the United States Supreme Court (350 U.S. 222) reversed the lower court holdings that the landowner was entitled to power site value. (App. Br. 60). Hence, the United States Supreme Court had no occasion to pass upon the propriety of any of the valuation testimony relied upon by the District as analogous here. We also note that in neither of the Circuit Court of Appeals opinions (215 F.2d 592 and 221 F.2d 299) is there any discussion

of the valuation methods used by the landowners' experts. The sole challenge by the Government to this testimony appears to have been, that as a matter of law, no power site value was payable. The only District Court opinion which explains the *method* of valuation is that of Judge Wyche at 114 F. Supp. 719. Here again, the Government does not appear to have challenged the valuation methods used by the experts. It is, therefore, difficult to understand how Judge Wyche's opinion can be construed as approval of these methods. The *methods* used were not in issue. Moreover, it appears that the Commissioners, whose report was reviewed by Judge Wyche, relied primarily upon the testimony of Dr. William P. Creager. (114 F. Supp. 724). The PUD describes the method used by Dr. Creager, adopted by the Commissioners:

"Dr Creager determined that the annual cost of producing hydro power at a contemplated project on the undeveloped lands was \$139,000 less than the annual cost of producing a like amount of power by steam. He capitalized this sum at 6 percent, which gave the potentially-integrated power site a theoretical value of approximately \$2,3000,000." (App. Br. 59).

Thus, the crucial testimony in *Twin City* was a capitalization of benefits method based on a comparison with a hypothetical steam plant.

The PUD, in this case, however, informed the court before its value witnesses commenced their testimony that it was not employing the capitalization method. (R. Tr. 528-529).

Later, Mr. Vaughn, the PUD's principal witness as to value, testified that he did not deem either the steam comparison method which he called the "theory of substitution" (R. Tr. 1081) or the capitalization of income method (R. Tr. 1084) to be appropriate. Mr. Courtney, the PUD's other value witness, also testified that he discarded the steam comparison and capitalization of income approaches as improper. (R. Tr. 1419, 1444). Mr. Courtney testified on direct that his valuation in the *Twin City* case was worked out on the basis of capitalization of earnings, to which he applied a judgment factor. (R. Tr. 1391).

Since the basic method which was used by the witnesses in *Twin City* was discarded by the PUD's value witnesses, the *Twin City* testimony does not constitute a precedent of any sort for the methods used in this case.

POINT V

THE "TAKING" OF THE POWER VALUE OF THE PUD'S PROPERTIES IS NOT COMPENSABLE BECAUSE OF THE FEDERAL NAVIGATION SERVITUDE

The City's contention, set out in the Pretrial Order, that no power site value should be included in the award to the PUD because of the federal navigation servitude (Tr. 41-42) was overruled by the District Judge in the hearing on the Pretrial Order. The judge said, "I don't think that the dominant servitude has been shown to control here, that the licensee is in a different position than the sovereign." (R. HPO 130).

The application of the federal navigation servitude doctrine to the instant proceedings is the subject of the City's cross appeal. To avoid repetition, we ask the court to consider our argument in support of our cross appeal as an additional ground upholding the judgment below. In other words, if the court upholds the application of the doctrine to the PUD's property, the various specifications of error of the District concerned with admissibility of the testimony of their witnesses concerning power site value need not be considered. If the doctrine applies, the testimony of the PUD's witnesses concerning power site value was properly rejected on the ground that under the doctrine no compensation is payable for power value.

PART TWO

OPENING BRIEF OF CITY AS APPELLANT

JURISDICTION

This is a cross appeal from entry of judgment in favor of the landowner in a condemnation proceeding under Section 21 of the Federal Power Act (16 U.S.C. § 814). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The sole issue involved in this cross appeal is whether the trial judge correctly included in the award to the landowner, PUD, amounts for its property interests lying below the line of ordinary high water. If this court sustains our view, no further proceedings will be necessary to determine the correct amount of compensation, since the findings entered by the trial court set separate values on each of the

interests owned by the PUD. The court found the fair market value of the uplands taken to be \$1,430.00 and of the easement to the gaging stations to be \$1.00. (Tr. 94). Hence, full compensation to the PUD for all of its property above the line of ordinary high water would be \$1,431.00. The City proposed conclusions of law, at the end of the case, which, if adopted, would have recognized the application of the federal navigation servitude doctrine and would have provided that the PUD was entitled to \$1,431.00 for its property interests. (Tr. 51-52).

SPECIFICATION OF ERRORS

1. Allowance of compensation to the PUD for its interests in shorelands lying below ordinary high water of the Pend Oreille River. (Tr. 95, 96).

2. Rejection of the following Conclusions of Law proposed by the City:

“V

The “taking” of the power value of defendant’s properties is not compensable because of the applicability of the federal navigation servitude doctrine. Because of the application of said doctrine aforesaid, defendant is not entitled to compensation of any sort for any of its property interests lying below the line of ordinary high water of the Pend Oreille River.

VI

Defendant is entitled to compensation in the amount of One Thousand Four Hundred and Thirty-One Dollars

(\$1,431.00) for the taking by plaintiff of defendant's property and property interests set forth and described in paragraph IX of the Findings of Fact herein, which sum includes the damage to the portion of Parcel 1 which is not taken." (Tr. 51-52).

SUMMARY OF ARGUMENT

1. The federal navigation servitude precludes compensation for any lands lying below the line of ordinary high water of a navigable stream. The same doctrine precludes compensation for water power value of lands adjacent to a navigable stream, but lying above the line of ordinary high water.

2. Seattle, as agent and licensee of the United States under the Federal Power Act, in exercising rights under Section 21 of that Act (16 U.S.C. § 814) is vested with the full measure of the federal power of eminent domain. The "taking" of the property interests of the PUD lying below ordinary high water by Seattle is, therefore, in law the act of the federal government and is not compensable. Likewise, the "taking" of water power value of the PUD uplands is non-compensable.

POINT I

THE FEDERAL NAVIGATION SERVITUDE PRECLUDES ANY COMPENSATION FOR SHORELANDS AND ANY WATER POWER VALUE FOR UPLANDS

Two recent decisions by the United States Supreme Court have crystallized the doctrine of the navigation servitude as

it applies to projects authorized by the federal government in aid of interstate and foreign commerce. The first confirmed the fact that compensation is precluded for any water power value of lands adjacent to a navigable stream but above the line of ordinary high water. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The second confirmed the rule that no compensation is payable for interests lying below that line. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961).

In the *Twin City* case, the United States, in execution of a congressionally approved project for the comprehensive development of the Savannah River Basin (§ 10 of Flood Control Act of 1944, 58 Stat. 887), condemned certain uplands along the navigable Savannah River owned by the Twin City Power Company, which had acquired them for the development of a power project. The District Court and Court of Appeals (Fourth Circuit) included in the compensation awarded for the land an amount for the value of the land as a prospective hydroelectric power site. The Supreme Court, speaking through Justice Douglas for a five member majority, reversed, holding that compensation need not be paid for the asserted water power value of the company's lands above high-water mark because of a superior dominant navigation servitude:

“The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called ‘a dominant

servitude' [citations] or a 'superior navigation easement' ..." (p. 224-25).

The Court quoted as controlling the earlier case of *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) wherein it had been said:

"... 'Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable'..." (350 U.S. at 226).

While four Justices, Burton, Frankfurter, Minton and Harlan dissented in *Twin City*, the subsequent 1961 decision of the Court in the *Virginia Electric & Power Co.* case, makes it clear that the navigation servitude doctrine of *Twin City* is now accepted law. All of the Justices, majority and dissenters, in the *Virginia Electric* case were agreed that the navigation servitude doctrine precluded payment of compensation on construction of a federal project in a navigable stream for power value of fast lands adjacent to a stream above ordinary high water, or any compensation for lands or interests below the ordinary high-water mark:

"... A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in *United States v. Chicago, M. St. P. & P. R. Co.*:

"The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage

sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.'.."

* * *

"But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In *United States v. Twin City Power Co.* 350 U.S. 222, 100 L ed 240, 76 S Ct 259, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from the location of the land, is attributable in the end to the flow of the stream — over which the Government has exclusive dominion. 350 U.S. at 225-227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss [citations] it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated. (365 U.S. at 628, 629.)

Thus since the navigation servitude doctrine of the *Twin City* and *Virginia Electric & Power Co.* cases applies to the PUD's property interests, it is clear (1) that no compensation is payable for any power value of such properties, and (2) that no compensation whatever need be paid for any of the PUD's shoreland interests, which by definition are below the ordinary high-water mark of the Pend Oreille River. The principle of these cases has long been followed by this court. *Washington Water Power Co. v. United States*, 135 F.2d 541 (9th Cir. 1943), *cert. den.* 320 U.S. 747 (1943); *Continental Land Co. v. United States*, 88 F.2d 104 (9th Cir. 1937), *cert. den.* 302 U.S. 715 (1937).

The only question, not passed upon by the foregoing authorities, which might distinguish them from the instant case is whether the navigation servitude doctrine applies to condemnations under section 21 of the Federal Power Act. For the reasons to follow, we believe that the doctrine applies equally to the federal government and to agencies to whom it delegates its powers, such as the City of Seattle.

POINT II

THE NAVIGATION SERVITUDE APPLIES TO CONDEMNATIONS UNDER SECTION 21 OF THE FEDERAL POWER ACT

While the matter has never been squarely adjudicated, analysis of the Federal Power Act and analogous precedents leaves no doubt that the navigation servitude is applicable to Seattle's condemnation under section 21 of the PUD properties.

It is now conclusively established that section 21 confers *federal* eminent domain powers on licensees. *Public Utility District No. 1 of Pend Oreille County v. FPC*, 308 F.2d 318, 321-323 (D.C. Cir. 1962), *cert. den.* 372 U.S. 908 (1963); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

The District of Columbia Circuit in its opinion in the direct review proceedings from the FPC orders upon which the instant section 21 proceeding is based quoted the following language from the *Tacoma* case:

“We believe that respondents’ construction of this language is in error. The questioned language expressly refers to possible “indebtedness limitations” in the City’s Charter and “questions of this nature,” *not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license.* * * * (Emphasis added.)” (308 F.2d at 322-23).

The Circuit Court then concluded:

“What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. Were it otherwise – i.e., if indeed the limitation of the state-granted right of eminent domain prevented the exercise of *federally-granted power of condemnation* in the area proscribed by it – PUD’s argument that it disables Seattle in this situation could not be upheld.” (Emphasis added.) (308 F.2d at 323).

If any doubt remained that Seattle was invested with federal rights which permitted it to do all things in the execution of its federal license which the United States might do itself, it was dispelled by the United States Supreme Court’s summary reversal of the Washington Supreme Court in *Seattle v. Beezer*, 376 U.S. 224 (1964). There, the Court upheld Seattle’s right to take the PUD’s property in these proceedings, despite the conclusion of the Washington Supreme Court that a state statute forbade the taking. The action of the Court should be interpreted to mean that Seattle, in these Section 21 proceedings, stands in the shoes of the federal government, and becomes for this purpose a federal instrumentality.

The Second Circuit in *Tuscarora Nation of Indians v. Power Authority of New York*, 257 F.2d 885 (2nd Cir. 1958), *cert. den.* 358 U.S. 841 (1958), recognized that a licensee, in bringing section 21 proceedings is an agency of the federal government. There the court said:

“The direction to the Federal Power Commission was specific, namely, ‘to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement.’ The licensee by virtue of section 814 [section 21 of the Federal Power Act] becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign.” (257 F.2d at 894).

It is thus now firmly established that Congress delegated in section 21 the full measure of its federal eminent domain powers. Earlier cases had made it abundantly clear that Congress may delegate its eminent domain powers to non-federal agencies. *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 616 (M.D. Ala. 1922)¹; *Missouri v. Union Elec. Lt. & Power Co.*, 42 F.2d 692, 698 (W.D. Mo. 1930) (condemnation action under section 21 as against state-owned land devoted to public use); see also *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 656-658 (1890) (exercise of eminent domain power of national government by railroad corporation against Indian lands);² *Thatcher v. Tennessee*

¹Cited with approval in *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 at 176 (1946).

²Cited with approval in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 at 121-122 (1961).

Gas Transmission Co., 180 F.2d 644, 647-648 (5th Cir. 1950), *cert. den.* 340 U.S. 829 (delegation of federal eminent domain powers to natural gas company under section 7(h) of Natural Gas Act paraphrasing section 21 of Federal Power Act); *Latinette v. City of St. Louis*, 201 F. 676 (7th Cir. 1912) (City of St. Louis, Mo. authorized as federal agent to condemn land in Illinois for bridge across Mississippi River); *City of Davenport v. Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S.D. Ill 1957), *aff'd* 252 F.2d 354 (7th Cir. 1958) (City of Davenport, Iowa, held the exclusive donee of federal eminent domain power over navigable waters to take land in Illinois dedicated to a public use for interstate bridge). In *Nichols on Eminent Domain* (3rd Ed.), section 2.15, the principle of these cases is summarized as follows:

“... In such cases Congress may create its own instrumentalities or use those already existing and it may give to a corporation organized under authority of a state power which the state did not give it and could not constitutionally have given it.”

The conclusion is inescapable that Congress in delegating its federal eminent powers to licensees under the Federal Power Act granted its full navigation servitude powers.

First, the language of the Act specifically confers eminent domain powers for the purpose of developing navigable waterways. Section 21 of the Federal Power Act expressly authorizes licensees to exercise a right of eminent domain to acquire —

“... the lands or property of others necessary to the construction, maintenance, or operation of any dam,

reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement *which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce ...*" (16 U.S.C. § 814; Emphasis supplied.)

The federal government, through the Federal Power Commission, has determined the necessity of the taking under section 21. In issuing a license to Seattle for the Boundary project, the Commission expressly found, in the terms of the Act, that:

"... The Boundary Project as hereinafter authorized is best adapted to a comprehensive plan for this development of the Pend Oreille River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." (26 F.P.C. 54, at 139-140).

The language of section 21 authorizing condemnation for projects for "improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" must be read with reference to section 4(e) of the Act which grants to the Commission Congress' full authority over navigable waters for the purposes of the Act. Section 4(e) expressly authorizes the Commission to issue licenses:

"...for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and *improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate*

commerce with foreign nations and among the several States . . .” (16 U.S.C. § 797(e); Emphasis supplied.)

The Supreme Court has held that Section 4(e) is an exercise by Congress of its navigation servitude powers:

“The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purposes of commerce. The power flows from the grant to regulate, i.e., to ‘prescribe the rule by which commerce is to be governed.’ This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgement as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; ‘that the running water in a great navigable stream is capable of private ownership is inconceivable.’ Exclusion of riparian owners from its benefits without compensation is entirely within the Government’s discretion.

“Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised . . . through section 4(e) of the present Power Act, 16 USCA § 797(e).” *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-24 (1940).

The Court in the *Appalachian* opinion cited and relied upon *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913), the case which, in turn, was a forerunner of *Twin City*.

Second, the language of section 21 enacted in 1920 conferring federal eminent domain powers “for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce” is similar to the language of section 11 of the Act of March 3, 1909 (35 Stat. 815, 820) construed by the Supreme Court in *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, (1913), as an exercise of the navigation servitude. Section 11 of the 1909 Act authorized the condemnation of lands near the navigable St. Marys River, Michigan, as “necessary for the purposes of navigation of said waters and the waters connected therewith.” Thus when Congress in 1920 inserted a phrase having a similar reference to the direct use of Federal Commerce Clause powers in section 21, it must have intended the full use of such powers in furtherance of the “vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation...” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 171 (1946).

One of the earliest cases which recognized that the delegation of federal powers to non-federal agents may include the navigation servitude was *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (C.C.D. N.J. 1887)* by Justice Bradley while

*Cited with approval in *United States v. California*, 332 U.S. 19, 30 (1947); *United States v. Carmack*, 329 U.S. 230, 240 (1946); *United States v. Wayne County*, 252 U.S. 574 (1920), affirming 53 Ct. Cls. 417 (1919); *Luxton v. North River Bridge Co.*, 153 U.S. 525, 532 (1894); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

on Circuit. This was a suit by the Attorney General of New Jersey for an injunction to restrain a private transit company and railroad company from erecting a bridge between New Jersey and Staten Island in New York across navigable waters, to be situated on state owned lands on the shore and under the water. The companies claimed the right to build the bridge under an act of Congress. The state objected on the ground, *inter alia*, that its lands were being taken without compensation. Justice Bradley, after ruling that Congress could confer its power to construct a bridge across a navigable stream for the furtherance of commerce among the states to a private corporation, and that these powers could be exercised without the consent of the state, held that no compensation was payable to the state for the taking of its lands because of the navigation servitude. Also see *People v. Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), *aff'd* 228 N.Y. 203, 126 N.E. 801, *cert. den.* 254 U.S. 631 (1920).

While the question presented by this appeal has never been ruled on by the United States Supreme Court, *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359, 373 (1948) seems to foreshadow the view which the Court might take of the instant question. While that case involved only an exercise of state eminent domain powers on a non-navigable stream, and not the exercise, as here, of federal eminent domain powers on a navigable stream, four of the justices, in dissent, viewed the Federal Power Act, *per se*, as an exercise of Congress' navigation servitude powers to preclude anyone, not holding a federal license, from claiming water power un-

der state law. In that case, the Grand River Dam Authority, a public agency of the State of Oklahoma, sought to condemn lands owned by Grand Hydro, a private utility, held for hydropower purposes adjacent to a non-navigable stream. The Authority, while it held a license from the Federal Power Commission to build its project, chose to condemn the lands in the state courts under state law, rather than to exercise its section 21 powers. The Oklahoma Supreme Court held that, as a matter of state law, power site valuation had to be paid. The United States Supreme Court affirmed on the ground that nothing in the Federal Power Act could be said to supersede specifically the state law in this situation. However, the majority expressly reserved opinion as to the result if the action had been brought under section 21:

“If either the United States, *or its licensee as such*, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land. The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States *or by one of its licensees* in reliance upon rights derived under the Federal Power Act.” (335 U.S. 359, 373) (Emphasis supplied).

In spite of the fact that the majority opinion carefully reserved federal rights on the exercise of federal eminent domain powers, and further that only a non-navigable stream

affecting a downstream navigable stream was involved, four justices dissented. Justice Douglas, joined by Justices Black, Murphy and Rutledge, observed:

“The result of this decision, no matter how it is rationalized, is to give the water-power value of the current of a river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it. The United States has asserted through the Federal Power Act its exclusive dominion control over this water power. That Act specifies how one may acquire a license to exploit it, § 23(b), 16 USCA § 817, 5 FCA title 16, § 817, and the conditions under which the licensee must operate. See *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

“Petitioner has such a license. Respondent has none and, for reasons unnecessary to relate here, concededly cannot obtain one. Respondent therefore has no claim to the water-power value which the law can recognize, if the policy of the Federal Power Act is to be respected ...” (pp 375-76).

The dissent is significant in that it gives a strong indication of the possible result had the case involved an exercise of federal eminent domain powers. The more recent development of the doctrine of the navigation servitude by *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), indicates the trend of the Court's view.

The opinion of the Court in the *Virginia Electric & Power Co.* case left no doubt as to the status under the navigation servitude doctrine of property rights below high water. All nine justices, in three separate opinions, agreed that no compensation was payable for the “taking” of such rights. The

three dissenting justices urged that the majority did not go far enough. In their view the servitude precluded compensation for an easement over fast lands as well as the shorelands and bed of the river. Justice Douglas, concurring with the majority, noted that the sole subject of controversy was over the status of the lands above high water. It was conceded by all that no compensation was payable for property lying below high water. Justice Douglas quoted in this connection from *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945):

“‘High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid.’” (365 U.S. 637).

While Justice Douglas did not quote further from the *Willow River* case, the opinion in that case continues:

“But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation.” (324 U.S. 509).

In the majority opinion in the *Virginia Electric & Power Co.* case, Justice Stewart made it clear that no compensation is payable for property interests below the high water mark. After quoting an earlier holding (*United States v. Chicago, M. St. & P. R. Co.*, 312 U.S. 592 (1941)) he wrote:

“Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any

taking of fast lands which results from the exercise of the power.” (365 U.S. 628).

The PUD fee-owned shorelands and the shorelands over which it held an overflow easement, described in the findings as Parcel 2 and Parcel 3, respectively (Tr. 86-87), are by definition, below the line of ordinary high water. RCW 79.01.032 defines second-class shorelands as:

“... bordering on the shores of a navigable ... river ... between the line of ordinary high water and the line of navigability ...”

It follows that the District Judge erred in including in the award to the PUD compensation for the “taking” of the shoreland rights.

CONCLUSION

Congress, acting through the Federal Power Commission, has by its orders granting Seattle a license, made Seattle its agent for purposes of acquiring property under section 21 necessary to construction of Boundary. Consequently, no power site valuation need be paid (nor any compensation at all for interests in the shorelands), because of the navigation servitude to which such properties are subject. The PUD, its predecessor, Colonel Cooper, and his predecessor, the State of Washington, all held the shorelands subject to the superior right of the federal government to use them to improve commerce. The exercise of that right, through Seattle as an agent or instrumentality of the federal government, creates no occasion for compensation. Therefore, the decree

below should be modified to exclude from the award compensation for the shoreland interests. Except for this, the decree should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By _____
RICHARD S. WHITE, of counsel
for City of Seattle
Appellee-Appellant

APPENDIX

APPENDIX "A"

STIPULATION

It is stipulated by and between the parties that Exhibit "A" attached hereto is a true copy of Agreement between City of Seattle and Public Utility District No. 1 of Pend Oreille County, Washington dated December 20, 1965, and that the court may consider this agreement as part of the record on appeal.

DATED this 5th day of April, 1966.

RICHARD S. WHITE
*Of Attorneys for the
City of Seattle*

WILLIAM G. ENNIS
*Of Attorneys for Public Utility
District No. 1 of Pend Oreille
County, Washington*

APPENDIX A

AGREEMENT

THIS AGREEMENT, made and entered into this 20th day of December, 1965, by and between the CITY OF SEATTLE, hereinafter referred to as the City, and PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, hereinafter referred to as PUD, WITNESSETH:

WHEREAS PUD is the owner of a hydroelectric project located on the Pend Oreille River in Pend Oreille County, Washington, known as the Box Canyon Project, which was authorized, constructed and is being operated pursuant to the terms of a license issued by the Federal Power Commission February 5, 1952, in proceedings numbered "Project No. 2042," and which said project as originally authorized and constructed includes a power house containing four turbine-generator units, and Article 35 of said license provides as follows:

"Article 35. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so after notice and opportunity for hearing, the Licensee shall install an additional generating unit."

and

WHEREAS Seattle is in the process of constructing a hydroelectric project on said Pend Oreille River known as the Boundary project and located downstream from said Box Canyon project, which said Boundary project was authorized and will be constructed, operated and maintained pursuant

to a license issued by the Federal Power Commission in proceedings numbered "Project No. 2144," Article 48 of which provides:

"Article 48. The Licensee shall within two years from the time Boundary Project is placed in operation, enter into an agreement with Public Utility District No. 1 of Pend Oreille County to compensate the PUD for encroachment on the Box Canyon Project No. 2042. In the event no satisfactory agreement is concluded by such time, then upon application by the PUD the Commission shall fix and determine the compensation to be made by the Licensee to the PUD for such encroachment after notice and opportunity for a hearing."

and

WHEREAS Seattle, for the purpose of acquiring lands and rights needed by it in connection with its Boundary project, brought action in the Federal District Court of the Eastern District of Washington, Northern Division, cause No. 2357, to condemn certain lands and rights owned and held by PUD, in which action PUD contended that in determining the extent of the taking by Seattle for which PUD would be entitled to compensation it should be considered on the basis that Seattle would exercise in full the legal right it sought to overflow with its Boundary project reservoir all of the second class shore lands on both banks of the Pend Oreille River extending downstream from the Box Canyon Dam, thereby raising the water level in the Box Canyon project tail race to elevation 2,004 feet and destroying to a great extent the power and energy production capacity of Box Canyon Dam; and

WHEREAS the Federal District Court aforementioned ruled in said condemnation action that Article 48 of the Boundary license above quoted was binding on the PUD and prescribed an exclusive means of determining encroachment damage on the Box Canyon project by the Boundary project reservoir and thereby eliminated this element of compensation from said condemnation action, which said ruling, among others, is the subject matter of PUD's appeal of said action to the United States Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS the parties desire to agree at this time as to the manner in which the extent of the encroachment of the and the manner in which Seattle shall compensate PUD for such encroachment;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, IT IS AGREED AS FOLLOWS:

1. The PUD and the City shall by joint agreement select an engineer or engineering firm to act as Chairman of a three-man Board, consisting of the Chairman and the chief engineer of each of the parties or their duly authorized representatives. The chairman of the Board shall be skilled in the conducting of such tests and making such observations as are necessary to determine the loss of plant capacity, power and energy production resulting from encroachment of the Boundary Reservoir on the Box Canyon plant. He shall also be skilled in deriving from these data performance curves necessary to the future determination of such losses

under all plant operating conditions. The Board shall determine and cause to be made and interpret the results of tests and observations required to achieve the desired objectives within the limits of accuracy commensurate with the probable reliability of hourly observations necessary to the determination of encroachment losses from the performance curves. Upon submittal of its reports to the parties interpreting the results of the tests and investigations aforesaid and establishing continuing operating procedures for the determination of encroachment, the Board shall be dismissed.

The PUD shall make available to the Board at the cost of reproduction such of its records as it may require, and shall permit the calibration of and operate at its expense all existing meters, gages and gaging stations for all the purposes required by this agreement. The PUD shall also permit the installation within or without the plant of necessary or desirable temporary instruments and gages.

The City will pay all costs of the tests and determinations above outlined, including reimbursement for lost revenue due to curtailment of plant production for the purposes of these tests.

2. The City will estimate and later compute within the accuracy of gage and meter readings and the performance data derived from the above-described tests the loss in power and energy generated and transformed at the Box Canyon Project during each hour of the day due to encroachment of the Boundary Reservoir and the City will make restitution for said loss in kind at the terminals of the 115 KV side of

the Box Canyon Substation through normal scheduling procedures at the time it occurs or such other times as are mutually agreeable. Any adjustments required from the previously scheduled estimates shall be scheduled as deviations in the manner customary in scheduling energy transfers.

3. PUD agrees to install and maintain at the expense of the City any additional instrumentation that may be required by the Board.

4. Determinations by a majority vote of said three-man Board shall be binding on both parties. The calculation of encroachment losses, derived observation and the performance curves in accordance with instructions for their use prepared by the Board shall likewise be binding.

5. Both parties also being parties to the Pacific Northwest Coordination Agreement of September 15, 1964, and to the Box Canyon Power Purchase Contract of August 1, 1955, agree to cooperate on mutually advantageous arrangements under the terms of either or both of said contracts for delivery, transmission, storage, or exchange of the power and energy herein contracted to be delivered by Seattle.

6. Upon the properly authorized execution of this agreement by the parties hereto, the claim made by PUD in the aforementioned condemnation action with reference to the destruction of production capacity of Box Canyon Dam by reason of encroachment by the Boundary Project Reservoir and referred to above shall be deemed settled and eliminated from said condemnation action without prejudice and to any

and all claims and contentions asserted by PUD in said condemnation action. Also this agreement shall be deemed to constitute the agreement for compensation by Seattle to PUD for encroachment on the Box Canyon Project referred to in Article 48 of the FPC Boundary Project license hereinabove quoted.

7. Except as to claims for loss of plant capacity, power and energy production resulting from encroachment of the Boundary reservoir on the PUD's Box Canyon plant, nothing herein contained shall be construed to constitute settlement of or a bar to any claim or claims that may hereafter be asserted by PUD against the City, either for damages to the properties of PUD not taken by the City in condemnation Cause No. 2357 aforementioned or for additional costs and expenses PUD may incur in the maintenance and/or operation of its said properties occasioned by the construction, maintenance, or operation of the Boundary project works or of the works appurtenant or accessory thereto.

The inclusion of the foregoing paragraph shall not be construed as the admission of liability by the City for any such claims.

IN WITNESS WHEREOF, the parties have hereunto set their respective names and seals this 20th day of December, 1965, by their agents thereunto duly authorized, in the case of Seattle by its Ordinance No. 94325, and in the case of the PUD by its Resolution No. 629.

CITY OF SEATTLE

By (s) J. D. Braman
Mayor

Attest:

C. G. Erlandson
City Comptroller

PUBLIC UTILITY DISTRICT No. 1 OF
PEND OREILLE COUNTY, WASHINGTON

By (s) John M. Fountain
President

Attest:

F. W. Schwab
Secretary

FEB 7 1967

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

CITY OF SEATTLE, *Appellant*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellee*.

*On Appeal from the Judgment of the
United States District Court for the Eastern District
of Washington*

BRIEF OF APPELLANT-APPELLEE

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UNITED STATES COURT of APPEALS

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UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

CITY OF SEATTLE, *Appellant*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, *Appellee*.

*On Appeal from the Judgment of the
United States District Court for the Eastern District
of Washington*

BRIEF OF APPELLANT-APPELLEE

Public Utility District No. 1 of Pend Oreille County

EXPLANATORY NOTE

The transcript of record on this appeal, which will be referred to herein by the designation "R," consists of the following:

(1) Original papers from the file of the Clerk of the District Court bound together;

(2) The Court Reporter's transcript of the proceedings at the time of the hearing on the pretrial order. This is under separate cover and, in addition to the designation "R," will also include the further designation "HPO" (hearing on pretrial order);

(3) The Court reporter's transcript of the proceedings at the time the findings of fact and conclusions of law were presented to the District Court. This is under separate cover and, in addition to the designation "R," will also include the further designation "PCF" (proceedings concerning findings);

(4) The Court reporter's transcript of the proceedings at the time of the District Court's ruling on motion to reconsider. This is under separate cover and, in addition to the designation "R," will also include the further designation "MTR" (motion to reconsider).

The reporter's transcript of the evidence and proceedings, consisting of 12 volumes, will be referred to by the designation "R. Tr."

Exhibits will be referred to by the designation "Ex." Seattle's exhibits will be prefixed with the letter "P" (Ex. P.), and the PUD's exhibits will be prefixed with the letter "D" (Ex. D.).

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and decree of condemnation filed March 10, 1965, determining the compensation payable by Appellee-Appellant, City of Seattle (hereinafter referred to as Seattle), for the condemnation of properties and rights owned and held by Appellant-Appellee, Public Utility District No. 1 of Pend Oreille County (hereinafter referred to as PUD) (R. 96-99). Notice of appeal and notice of cross-appeal were both filed April 9, 1965 (R. 106, 109).

The jurisdiction of the district court was invoked under Section 21 of the Federal Power Act (Title 16 U.S.C., Sec. 814) (R. 1). The jurisdiction of this court is invoked under Title 23 U.S.C., Sec. 1291.

STATEMENT OF THE CASE

The PUD is a municipal corporation organized and existing pursuant to the laws of the State of Washington. Its boundaries are co-extensive with the boundaries of Pend Oreille County, Washington, and it owns, operates, and maintains electric utility properties for the generation and transmission of electric power and energy for sale within and without the District. The PUD's lifeline is the Pend Oreille River, a navigable stream flowing in a generally northerly direction from the State of Washington into British Columbia, Canada. The entire course of this river in Washington is within the boundaries of the PUD. Commencing in 1952, and pursuant to a license issued by the Federal

Power Commission, the PUD constructed what is known as its Box Canyon Dam project on said river about 19 miles south of and upstream from the Canadian border (R. 26, 27, 33).

Seattle is a municipal corporation in the State of Washington and through its Department of Lighting operates and maintains a lighting and power system. (R. 26).

In addition to the properties and rights used directly in the operation of its Box Canyon Dam project, PUD, except for a few scattered small tracts of privately owned land, owned and held all of the uplands, shore lands, and rights to perpetually back and hold the waters of said river upon state-owned shore lands situated downstream from the Box Canyon Dam which were sufficient, together with available federal lands set aside for power site purposes, to permit the construction and operation of the Boundary Dam hydroelectric project now being constructed by Seattle on said river or the Z Canyon dam hydroelectric project planned by the PUD in the same general area (Exs. D. 109, D. 133, P. 12; R. 84-89, 93). The Boundary dam site is located approximately one mile upstream from the Canadian border (Ex. D. 109; R. 82). The Z Canyon dam site is located about one mile upstream from the Boundary site (Ex. D. 109; R. 82). Both sites are adaptable to the production of hydroelectric power and utilization of one site precludes the use of the other (R. 88).

This action concerns the condemnation by Seattle of these lands and rights owned by PUD downstream from Box Canyon dam. These lands and rights are shown on the map Ex. D 109 and the photographs (Exs. D. 113-114), which are inserted herein and are generally described as follows:

(a) 191.47 acres, more or less, of uplands located on west side of the Pend Oreille River at the Z Canyon dam site (Colored blue on the map).

(b) Fee simple title to all shore lands on both sides of the Pend Oreille River from a point commencing a short distance downstream from the Boundary dam site and running thence upstream to a point approximately 2 miles upstream from the Z Canyon dam site (Colored red on the map).

(c) The right, privilege, and authority to perpetually back the water of the Pend Oreille River upon, and overflow and inundate with said water the state-owned shore lands in the erection, construction, maintenance and operation of a water power plant. The shore lands affected by the aforementioned perpetual rights are the shore lands located on both sides of the Pend Oreille River from the Z Canyon dam site running upstream approximately 17 miles to the PUD's Box Canyon dam (Colored green on the map. It will be noted that, commencing at the Z Canyon dam site and running for a short distance upstream, the rights described in paragraph (c) overlap the shore

lands owned in fee simple. This area is colored red and green alternately.)

(d) An easement and right of way for the purpose of maintaining a measuring cable, stay cable, gaging station and other devices necessary or useful in stream-gaging work on uplands adjoining the river (Colored brown on the map). Map and pictures follow this page.

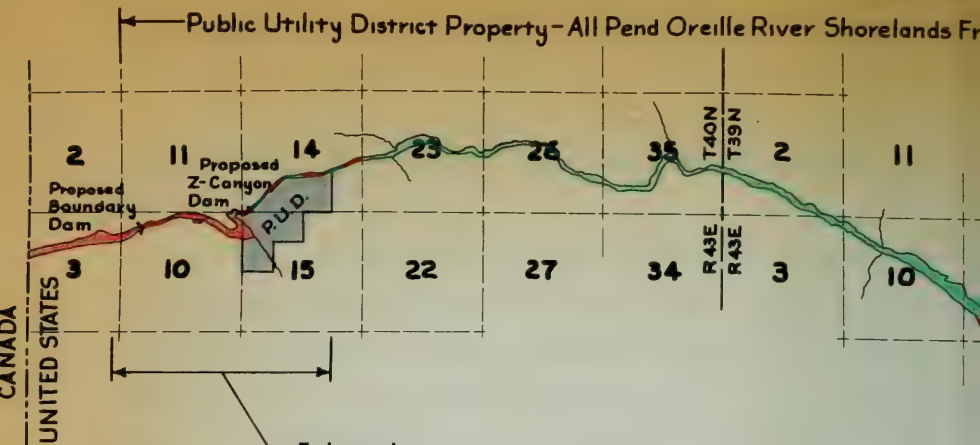
PUD's predecessor in ownership of the lands and rights in question was Hugh L. Cooper, now deceased, a well-known hydroelectric engineer. (R. 27-29, 91; R. Tr. 434-38).

By 1916, several years prior to the passage of the Federal Power Act in 1920, Mr. Cooper had united the various parcels of lands and rights which Seattle seeks to condemn in this action (R. 27) and had tested the foundation of the Z Canyon site and established its suitability to support a dam by sinking a 200 foot shaft along side the right bank of the river, tunneling under the river, and test drilling in all directions from the tunnel (R. Tr. 435, Ex. D. 112).

In 1928, Cooper installed on the properties at a point downstream from the Z Canyon site a measuring and gaging station for the purpose of measuring and recording the stream flow (R. 34).

In 1928, Cooper secured a preliminary permit from the Federal Power Commission and submitted his plans for the construction of a hydroelectric project at the Z Canyon site. His application for license was

CANADA



Enlarged
Portion







Z-CANYON LA

To Box Canyon Dam, Sec. 19 T38N R43E W.M. →

PUBLIC UTILITY DISTRICT No. 1
OF PEND OREILLE COUNTY
WASHINGTON

PROPERTY

SHORE LANDS, FEE TITLE --- 
SHORE LANDS, PERPETUAL
OVERFLOW --- 
UPLANDS, FEE TITLE --- 
UPLANDS, EASEMENT --- 



& LAND RIGHTS

Drawn By: D. Tucker - Sept. 22, 1964

Revised By: D. Tucker - July 8, 1967



EXHIBIT NO. 113

Looking upstream from left bank at a point hundreds
of feet above the river.



EXHIBIT NO. 114

Looking downstream from the right bank of the river
at a point a few feet above the bottom of the canyon.

denied without prejudice in 1936 (R. 34). Both the Boundary project and the Z Canyon project would occupy lands of the United States government (R. 30, 89) which have been set aside as power site reserves by executive orders (Exs. D. 110, 111; R. 93).

In addition to the properties and rights above described, the Cooper estate also owned and held the perpetual right to back the river water upon and overflow the shore lands lying upstream from the Box Canyon dam site. It was necessary that PUD acquire said rights in order to build and operate the Box Canyon project (Ex. D. 136). By negotiations culminating March of 1953, PUD acquired all of Cooper's property and rights both upstream and downstream from the site of the Box Canyon dam as a package deal (R. Tr. 951; Exs. D. 116, 117). This package also included Cooper's plans, engineering data, details and the results of development work for a dam at Z Canyon, which said plans, data and details were revised for PUD by Harza Engineering Company. Said plans aforesaid were acquired and revised as a part of the plan of the PUD for the development of a dam and power house at the Z Canyon site and in support of its application to the Federal Power Commission for a license (R. 91).

Negotiations that were initiated by Seattle a few months after PUD acquired the properties and rights with which we are here concerned, should be noted.

Seattle's Proposal for Joint Development

E. R. Hoffman, then Superintendent of Seattle City Light, wrote a letter to the manager of the PUD, dated October 28, 1953, (Ex. D. 119) stating that Seattle was filing with the Federal Power Commission an application for preliminary permit for the Boundary project on the Pend Oreille River. The letter suggests a cooperative agreement with PUD. On October 30, 1953, Mr. Hoffman wrote to the Seattle City Council with reference to such filing for a project some 350 miles northeast of Seattle and disclosed the receipt of notice from PUD, on October 29, 1953, of its intention to develop a project on this stretch of the river (Ex. D. 120). The record establishes that at that time PUD owned and held all of the properties and rights above described, and that Seattle owned or held absolutely nothing in this area. In February, 1954, Paul Raver, the new Superintendent of Seattle Light, and other Seattle representatives met with representatives of the PUD (R. Tr. 337) and thereafter subsequent meetings were held to further the joint venture for development of the Z Canyon-Boundary reach of the river (R. Tr. 345-46).

Memorandum of Intent

At the meeting of August 24, 1954, Mr. Campbell, PUD manager, explained that, because of the failure of the parties to reach an agreement on a fifty-fifty basis, the PUD commissioners had passed Resolution No. 328 (Ex. D. 122) directing him to file an applica-

tion for a license for a power project at Z Canyon. He said some action must be taken or he would file the application. Dr. Paul Raver, Superintendent of City Light, then called a stenographer and dictated what was termed a Memorandum of Intent (R. Tr. 466-67, Ex. D. 123). (Appendix pgs. 1-3)

It will be seen from this exhibit that PUD's ownership of lands and rights in the Z Canyon area and its definite plans for the development of a dam and power house at that stretch of the Pend Oreille River were recognized. Also, it shows that Seattle and PUD were committed to development of a power project at this location on a fifty-fifty basis.

Activities in this respect went so far as to include the submission of legislation which was enacted by the Washington State legislature in 1957 authorizing joint development of a power project by public bodies such as Seattle and PUD (R. Tr. 948-49). After the Memorandum of Intent was written, PUD did not file its application for a preliminary permit as had been directed in Resolution 328 (Ex. D. 122).

On July 29, 1957, disregarding the Memorandum of Intent, Seattle filed an application with the Federal Power Commission for a license for the construction and operation of the Boundary project in its name alone without joining PUD therein. Upon learning of this filing, PUD, on August 27, 1957, filed with the Federal Power Commission a petition to intervene in Seattle's application proceedings, together with an

alternate plan for a dam and power plant at the Z Canyon site. Shortly thereafter, a number of mining companies having properties in the area also intervened for the purpose of resisting all applications. On September 5, 1959, PUD filed a revised application for a license to construct and operate a hydroelectric project at the Z Canyon site. The various applications and petitions to intervene were consolidated for hearing.

The prayer of the mining companies was denied, as was PUD's application for a license, and Seattle's application for a license was granted (Ex. P. 9).

On March 8, 1963, Seattle filed its complaint in this action.

The Pretrial Order and Hearing

On March 2, 1964, the pretrial order in this action was entered (R. 26-47). On that day a hearing was held by the District Court for the purpose of clarification of issues.

One of the principal purposes of the pretrial order and the hearing held thereon was to determine what elements entering into the valuation of the PUD properties should be considered. The PUD contended the highest and best use of said properties and rights was for power site purposes and that this element of value was to be considered (R. 44). It was an admitted fact in the pretrial order that both "the Boundary and Z Canyon sites are physically adaptable to development for the production of hydroelectric power." (R. 29-30). During the trial, the District Court expressed the

belief that in fact the pretrial order conceded that the highest and best use of said properties was for power site purposes (R. Tr. 630-631). Seattle did argue, however, that this element of value should not be considered for two principal reasons.

The first was that, as the holder of a license from the Federal Power Commission, Seattle had inherited the federal government's right of dominant servitude over the flow of this navigable stream.

The second was that neither the PUD nor a purchaser from it could acquire the remaining lands necessary for a hydroelectric project at this location without resorting to eminent domain and this would preclude consideration of power site value (R. 41, 42; R. HPO 106-121).

The District Court rejected Seattle's contention that it succeeded to the government's sovereign right of dominant servitude over the stream. The District Court ruled that PUD had the right to establish (1) that the highest and best use of this property was for power site purposes; and (2) that there was a reasonable possibility in the reasonably near future that the PUD or its purchaser could develop this property as a power site (R. HPO 129-30) and with reference to PUD's properties and rights, said,

“they are entitled to have them evaluated as in the *Powelson* case, and in the *Grand River Dam Authority* case, for power site purposes.” (R. HPO 132. (Emphasis added.)

On the matter of just compensation, PUD also contended that consideration should be given to severance damage it would suffer by the taking of its properties and rights downstream from its Box Canyon project which were used by and which would be useful in the operation of its Box Canyon plant and with its contemplated hydroelectric project at the Z Canyon site (R. 45). Seattle argued that such severance damages could not be considered.

On the question of severance damage, the District Court ruled that, the PUD not yet having completed a dam at Z Canyon which was in actual operation in coordination with its Box Canyon Plant, the rules of severance damage did not apply and that "there should not be submitted to the jury any question of severance damages." (R. HPO 133).

This was the posture of the case at the commencement of trial to the District Court without a jury. It was in this setting that the following colloquy took place:

"THE COURT: All right, the Clerk will then file the stipulation.

"I think perhaps we should determine now where the burden of proof will be and who will have the burden of going forward, and I think it is somewhat covered by our previous discussions. I assume that the PUD may wish to do that; is that correct?

"MR. ENNIS: We had discussed this with counsel. It was our thought that, Seattle being the plaintiff, would go ahead with their evidence of

taking and of the value, then the PUD will put in its evidence of value, our valuation, and Seattle can rebut that.

“MR. WHITE: That is satisfactory, your Honor.

“THE COURT: Ordinarily in a condemnation case, that is the order of proof, but where is the burden of proof?

“I don’t think it is particularly important in a condemnation action of this kind where we have settled the primary legal problems.

“MR. ENNIS: Particularly in the absence of a jury. I suppose if we were making a trade with Seattle opening and closing, we would trade them that for the order of the Court that there would be no burden of proof instruction given to the jury, but where the Court is sitting alone here, I think that it probably becomes academic, in a sense. The Court will determine who has the burden and whether they have met it, I assume.”

“THE COURT: All right . . . (R. Tr. 14, 15).

The Trial

Seattle proceeded to put in its case. Its expert valuation witnesses valued the properties in the light of their useability for timber reforestation and without consideration to their use as a unit (R. Tr. 90, 147, 191, 223). Neither of Seattle’s valuation witnesses gave any consideration to the value of the properties for power site purposes (R. Tr. 149-52, 222). The District Court specifically found in Finding of Fact No. XXI. (R. 94) that the valuation expressed by Seattle’s witnesses included no power site value. Neither of said wit-

nesses professed to engineering knowledge or experience in determining values of property constituting all or practically all of the property necessary for a hydroelectric project. In fact, one of said witnesses, Mr. McQuigg, admitted he had no experience at all in appraising power sites (R. Tr. 218, 222) and that he was not competent to appraise property for power site purposes and would not attempt to do so.

In its case PUD established that the highest and best use of its properties and rights was for hydroelectric power purposes, and the District Court specifically so found in Finding of Fact XIX. (R. 93).

PUD established that it acquired the properties and rights as a part of its program to develop a dam and power house at the Z Canyon site, and the District Court specifically so found in Finding of Fact XVI. (R. 91).

PUD established that its high Z Canyon project, as proposed by it to the Federal Power Commission, with a pool elevation of 1985 feet, would require 2198 acres. Of this acreage, only 47 acres would have to be acquired from private owners. If it be assumed that the Federal Power Commission would have required a 200 foot buffer zone as part of the project, as it did for Seattle's Boundary project, the privately owned acreage that PUD would have had to acquire would be increased to only 143.2 acres out of a total of 2547.2 acres (see Finding of Fact XII., R. 88, 89). PUD's proposed low Z Canyon project, with a pool elevation

of 1885 feet, would, of course, require the acquisition of still fewer acres of private land.

PUD established that it or any prospective developer could acquire whatever additional lands were needed for the low Z Canyon project by voluntary transfer without resorting to condemnation (Finding of Fact XI., R. 88). The District Court entered a Conclusion of Law that PUD had sustained the burden of showing by a preponderance of the evidence that it was reasonably probable that PUD or a purchaser from it "could have assembled or could assemble in the reasonably near future by voluntary transfer the remaining non-federal parcels and property rights necessary to construct and operate a hydroelectric project at the Z Canyon site to pool elevation 1885 feet." (Conclusion of Law III., R 94, 95).

PUD's Basic Witnesses

For purposes of establishing the background and a basis for its expert valuation witnesses, the PUD called as witnesses the following:

Mr. Arthur E. Allen, a civil engineer employed by Harza Engineering Company as head of its engineering and planning department. Mr. Allen possesses both a B.S. degree and a M.S. degree in civil engineering from the Carnegie Institute of Technology (R. Tr. 484).

Mr. Mark D. Stenson, principal engineer with R. W. Beck & Associates, consulting engineers. Mr. Stenson, the holder of a degree in electrical engineering and registered in the States of Washington, Oregon, New Mexico and Texas as a professional engineer, had extensive experience in the construction and financing field of hydroelectric development (R. Tr. 739-46).

Mr. Donald J. Bleifuss, a consulting civil engineer who had completed countless investigations and reports in his participation in the construction and development of numerous hydroelectric projects throughout the world. (R. Tr. 822-29).

The Witness Allen

Mr. Allen testified to the type of hydroelectric project to which the PUD's Z Canyon site was adapted. He demonstrated a project could be constructed at the Z Canyon site with a 555 megawatt installed generating capability at a total cost of \$62,100,000, exclusive of financing costs and land and land rights costs (R. Tr. 649). This project would have a reservoir elevation of 1990 feet, the same as that of Seattle's Boundary project which is presently under construction (R. Tr. 652). Ex. D. 130A was admitted into evidence as illustrative of the testimony of the witness (R. Tr. 669).

Mr. Allen stated that, in his opinion, the project which he described as a typical project to which the PUD's Z Canyon site was adapted was one of very low cost and that the site was, in his opinion, of very

high value. In his experience he had known of people who were eager to build and did build hydroelectric projects costing approximately twice as much per kilowatt as the proposed Z Canyon project which he described (R. Tr. 687).

This witness also described a typical hydroelectric project that could be constructed at the Z Canyon site with a reservoir elevation of 1885 feet. Such a project would have a generating capability of 345 megawatts (R. Tr. 706); and its construction costs, exclusive of land rights and financing charges or transmission costs, would be \$56,420,000. (R. Tr. 710). Exhibit D 130B was admitted into evidence as illustrative of the testimony of the witness regarding the proposed "Low Z" project (R. Tr. 709). The witness testified on cross-examination that cost estimates on proposed projects of this nature were quite accurate and that in his experience on projects which he had seen through from planning to completion, the farthest he had been off in construction costs was 5 percent (R. Tr. 688).

The PUD attempted, through the witness, Allen, to show the adaptability for a hydroelectric project of the Boundary site where Seattle is presently constructing its project.

The PUD explained its theory to the Court in this respect that a prospective purchaser of the PUD's properties could and would consider the advisability of constructing his project at the Boundary site as an

alternative to constructing it at the Z Canyon site (R. Tr. 577-78). Under this theory, the witness Allen proceeded to testify regarding the description, construction costs, and generating capability of a hydroelectric project at the Boundary site (R. Tr. 574-712).

PUD's exhibit for identification (D-I-130), constituting the written report prepared by the witness Allen in conjunction with his testimony concerning the Boundary site, was objected to by Seattle (R. Tr. 627-28). This objection was sustained (R. Tr. 629).

The striking of Mr. Allen's testimony pertaining to the Boundary site (R. Tr. 718), the rejection of PUD's exhibit for identification, D-I-130, and the rejection of PUD's offer of proof in this regard (R. Tr. 721), are the subject matter of specifications of error No. 1 and will be further discussed in that part of the brief.

The Witness Stenson

Mr. Mark D. Stenson, referred to above, testified that the average annual energy capability of the proposed high Z Canyon project would be 3,476,000,000 kilowatt hours, and that of the proposed low Z Canyon project would be approximately 2,000,000,000 kilowatt hours (R. Tr. 750). This energy capability might in the future be increased by a large upstream project which had at that date been proposed but not yet completed (R. Tr. 751).

To the initial construction costs of the proposed "high Z" or "low Z" projects at the PUD's Z Canyon

site as testified to by the witness Allen, the witness Stenson added interest costs, certain fund costs (R. Tr. 753), and financing costs (R. Tr. 778), and concluded that the total bond issue costs, exclusive of land and land rights costs, for the proposed high Z Canyon project would be \$77,600,000 and that such cost for the proposed low Z Canyon project would be \$69,250,000 (R. Tr. 778). He thus concluded that the average cost of energy per kilowatt hour, computed without considering cost of site, at the proposed high Z Canyon project over the assumed fifty-year bond life would be 1.587 mills per kilowatt hour, and that such average cost of energy at the proposed low Z Canyon project would be 2.385 mills per kilowatt hour (R. Tr. 779).

In referring to Mr. Stenson, the Court said:

“You have already qualified him as an expert. You can ask him whether it is possible, can’t you?” (R. Tr. 781).

When questioned as to whether or not PUD could, in the reasonably near future, devote its properties to the proposed use at Z Canyon, Mr. Stenson testified:

“Well, I don’t think there is any question but what it could be developed by the District.” (R. Tr. 786).

The witness Stenson later testified that through his experience with similar projects he assumed that the PUD would have no difficulty in marketing the power that would be produced at the Z Canyon project (R. Tr. 820-21).

The Witness Bleifuss

Mr. Donald J. Bleifuss, who had examined and evaluated the Z Canyon site (R. Tr. 829-30) and who had in his experience made literally hundreds of cost estimates on projects similar to those testified to by the previous witness, Allen, had spot checked the calculations of the witness Allen and found them to be reasonable, in his opinion (R. Tr. 831-34).

The witness Bleifuss testified that there are three aspects to be considered in determining the desirability of a particular site for a hydroelectric project: Physical feasibility, functional feasibility, and economic feasibility (R. Tr. 833). From his study of the Z Canyon site, he found its physical feasibility to be almost ideal, being well suited to the development of a hydroelectric project (R. Tr. 835). Likewise, he found the functional feasibility to be very good from the fact that the terrain and the river profile permit concentration of head at the site and the fact that the site is on a stream which possesses a sufficient amount of flow to develop energy at the site (R. Tr. 835-36). He testified that economic feasibility of a hydroelectric site is determined by one thing only, and that is the average unit cost of energy which is obtained by dividing the annual cost of operating a plant constructed at the site by the average annual energy production (R. Tr. 836). In the words of the witness, this element of economic feasibility is of the utmost importance to a prospective developer of the site "because any reasonable man would form his judgment on the basis of what the

production is worth to him, and in order to estimate that he has to know those costs." The witness projected cost estimates for a proposed hydroelectric project at the Z Canyon dam as he had done for many other clients in the past (R. Tr. 841, 846, 848), and concluded that energy could be produced through the construction of a high dam at 1.5273 mills per kilowatt hour and through the construction of a low dam at 2.3356 mills per kilowatt hour (R. Tr. 850). Because the cost of land and land rights was the matter at issue in the trial, the above figures, of course, excluded that element of cost.

VALUATION WITNESSES

John L. Vaughan, Jr.

The PUD's first value witness, John L. Vaughan, Jr., was vice president in charge of special appraisals with the evaluation and appraisal firm of Marshall & Stevens, Inc. He had been in charge of special appraisals with that firm since 1948. He had completed two years at the University of Virginia, had studied electrical engineering at the Brooklyn-Edison Company's Employees' Institute, and had completed courses in the economics of property evaluation at the University of Southern California (R. Tr. 1059-61). The witness was a registered professional engineer in the State of California, a member of the National Society of Professional Engineers, the California Society of Professional Engineers, the Los Angeles Professional Engineers' Society, the Society of American Military Engineers, and a senior member of the Amer-

ican Society of Appraisers (R. Tr. 1061). He had published several articles on valuation matters in the Handbook of the American Society of Appraisers and had lectured at various universities and professional societies on that subject. (R. Tr. 1061-62).

He had worked as a valuation engineer for the Appalachian Power Company (R. Tr. 1064) and had worked for various other concerns in the field of evaluating properties with technical qualities of an engineering nature (R. Tr. 1064-66). In the course of his occupation, he had been called upon to evaluate numerous utilities, including electric facilities, for various private concerns and governmental agencies (R. Tr. 1066-68). He had qualified and testified as an expert in evaluation problems in the courts of 17 states as well as various federal courts, tax commissions, and other commissions, both on behalf of private individuals and on behalf of governmental agencies (R. Tr. 1069).

After Mr. Vaughan had testified to his familiarity with the PUD properties being condemned (R. Tr. 1075-77), he testified that the highest and best use of the property was for a hydroelectric installation (R. Tr. 1078-79). He then testified that, because of the unique nature of the property, the basic approaches to estimation of value could not be utilized (R. Tr. 1081-84). The comparable sales approach, in particular, was inapplicable inasmuch as the witness was unable to find any sales of comparable properties (R. Tr. 1081-84).

After Mr. Vaughan had stated that, in his opinion, the fair market value of the properties and rights being condemned was the sum of \$8,600,000 (R. Tr. 1100) and had testified as to the manner in which he reached that figure, the Court, upon motion of Seattle, struck the conclusion of money value reached by the witness, but permitted the balance of his testimony to stand in the record (R. Tr. 1282, 1338). The striking of this opinion of fair market value and the denial of an offer of proof with reference to Mr. Vaughan's testimony are the subject matter of specification of error number two.

The grounds urged in support of the motion to strike, and the offer of proof, are set forth therein. Due to its length Mr. Vaughan's testimony is set forth in the Appendix of this brief. (See App. pgs. 4-57)

Neville C. Courtney

The next PUD value witness was Neville C. Courtney, consultant engineer with the firm of Justin & Courtney, of Brooklawn, New Jersey. He was a graduate of the University of Pennsylvania with an AB degree and had completed two years of engineering at John Hopkins University. Mr. Courtney was a Fellow and a life member in the American Society of Civil Engineers, a member of the National Society of Professional Engineers, and a member of the International Congress of large dams. He was a registered engineer in the states of New Jersey and Pennsylvania and had been engaged in civil engineering for a period of fifty years, thirty-five of which had been in the field of

hydraulic and hydroelectric engineering (R. Tr. 1310-11). During the course of his experience, he had worked on the design and construction of various hydraulic and hydroelectric projects in various parts of the world (R. Tr. 1313-19).

One of the reasons Mr. Courtney was selected by PUD as an expert valuation witness was the District Court's pretrial ruling that PUD was entitled to have its properties and rights evaluated "as in the *Powelson* case, and in the *Grand River Dam Authority* case, for power site purposes." (R. HPO 132) In conjunction with his partner, Mr. Justin, now deceased, Mr. Courtney had either participated in the testimony or participated in the preparation of testimony regarding the valuation of the undeveloped dam sites in the *Grand Hydro* case (R. Tr. 1320-21) and in the *Powelson* case (R. Tr. 1322) which will be cited and referred to in the argument.

Mr. Courtney was also a principal valuation witness in the *Twin City* cases (R. Tr. 1322-24), which will be later referred to. The District Court referred to Mr. Courtney's qualifications as "tremendous." (R. Tr. 1496).

After Mr. Courtney had stated that, in his opinion, the fair market value of the properties and rights being condemned was the sum of \$7,495,000 and had testified as to the manner in which he reached that figure, the Court, as had been done with reference to

the testimony of the witness Vaughan, granted Seattle's motion to strike that portion of Mr. Courtney's testimony which stated his opinion of value of the properties and rights being condemned. The striking of this testimony is the subject matter of specifications of error number three. The grounds in support of the motion to strike are set forth therein. Due to its length Mr. Courtney's testimony is set forth in the Appendix to this brief. (See App. pgs. 58-98)

While Mr. Courtney was on the stand, the PUD offered into evidence a copy of the transcript of the record of the *Grand Hydro case* in support of its argument that valuation testimony grounded on the same basis as that offered through the witness Courtney, had been accepted by the Supreme Court of Oklahoma and approved by the United States supreme court (R. Tr. 1519-21). PUD is advised that this transcript, bearing the designation Ex. D. I. 144, which it contends is in fact an admitted exhibit, is to be forwarded for filing in these appellate proceedings by way of supplemental transcript of record, together with the colloquy between Court and counsel at the time it was offered.

The Court invited the PUD to close its testimony and appeal from the record as it stood with the following comment:

"We are about to recess, Mr. Klobucher, and I wonder if it would be worthwhile for me to make this observation:

"Obviously the landowner in this case is not satisfied with the observations made on March

2nd. If the PUD intends to take the position throughout the case, and obviously it does, to value this land as though a plant were there, perhaps you might prefer to have the record stand as it is with reference to the valuation of the property.

“Certainly, I am inviting a much more nominal valuation of the property than has been placed on it, and perhaps the PUD doesn’t want that. I don’t know, but I will leave that observation with you.

“If you change the position of the PUD in connection with this matter by introducing other testimony, it may change the positions heretofore taken with reference to the present testimony on value, which I have rejected.” (R. Tr. 1554-55).

The PUD then offered the testimony by written deposition of Jens Jensen and Roger H. McConnell, representatives of the mining interests in the Z Canyon-Boundary reach of the Pend Oreille River. This testimony revealed that the mining interests which would be affected by the construction of a dam at the Z Canyon site, although somewhat opposed to the construction of a high dam, were not opposed to the construction of a low dam at the Z Canyon site (R. Tr. 1592-94).

Prior to the close of its case, the PUD offered to prove through the testimony of its witness, John L. Vaughan, that the PUD’s properties had a fair market value of \$8,900,000 when appraised from a capitalization of income approach (R. Tr. 1627). This offer was made by the PUD as an alternative approach after the testimony of its two value witnesses regarding

their opinions of the fair market value had been stricken by the Court (R. Tr. 1627).

This would have been arrived at generally by computing the annual return from a completed hypothetical hydroelectric project on the properties and deducting the cost of the power as computed by previous witnesses. This income would have been capitalized to arrive at land value and discounted to arrive at the value of land and land rights in the present condition, taking into account the rights yet to be acquired. The validity of the value so computed would have been checked by comparing the cost of energy so produced with the cost of energy produced by other hydroelectric plants in the area (R. Tr. 1628).

The offer of proof was objected to by Seattle on the grounds that it was improper and unrealistic to capitalize the income from a hypothetical project which has not yet been constructed (R. Tr. 1629-30). The Court sustained the objection (R. Tr. 1630).

SEVERANCE

With reference to PUD's claim of damage to its Box Canyon properties and project caused by severing therefrom the downstream properties and rights, including the Z Canyon and Boundary dam sites, the following should be noted.

As hereinabove pointed out, PUD, in connection with its Box Canyon project, purchased all of the Cooper properties and rights on the river, including the rights

to overflow shore lands upstream from the Box Canyon dam, as well as the uplands, shore lands, and flowage rights downstream from Box Canyon that constitute the Boundary and Z Canyon sites and reservoir area. (See page 9, *supra*)

It was an admitted fact set out in the pretrial order that the properties and rights downstream from the Box Canyon dam, as well as Cooper's drawings, engineering data and development work, were acquired by PUD as a part of its plan for the development of a dam and power house at the Z Canyon site (R. 35).

Mr. Sewell, the engineer for PUD, testified:

"The PUD, at the time of these plans, were acquired, was in the process of constructing Box Canyon dam, and in the studies of Box Canyon dam, there were certain deficiencies on waterflow, based on 20 year studies, from 1928 to 1948, and these deficiencies were the flow being too great and cutting down the head of the plant, until, in some years, the plant would have to go out of production entirely, and the PUD desired to build a plant at Z Canyon to coordinate with Box Canyon plant, and especially at the time of these deficiencies." (R. Tr. 447-48).

Upon motion of counsel for Seattle, this answer was stricken (R. Tr. 449).

Later, Mr. Campbell, manager of the PUD, was called as a witness, and an attempt was again made to establish that the properties being condemned in this action had been acquired with Box Canyon construction funds with the approval of the lender, R.F.C., at

the time of construction of the Box Canyon dam as additions and betterments thereto in that a dam and power plant at Z Canyon would not only be a source of power during periods of high water when the Box Canyon must shut down, it would make possible a coordinated operation during other times of the year (R. Tr. 889-946). Objections were made to this line of proof, including the objection that it pertained to the issue of severance damages which had been eliminated from the case at the time of the hearing on the pretrial order (R. Tr. 894).

An offer of proof in this respect was made and is set out verbatim in the specifications of error at page 48 *infra*. In rejecting the offer of proof, the Court ruled that the only proof that would be acceptable would be the actual contents of resolutions duly adopted by the Commissioners of the PUD and that Mr. Campbell's oral testimony would not be admissible to explain or add to the recorded actions of the Commissioners (R. Tr. 945-46).

Although the testimony of Mr. Sewell above set out had been stricken, the District Court, in rejecting Mr. Campbell's testimony, said:

"Well, this matter has already been testified to by Mr. Sewell, you know, about the desirability of using Z Canyon to supplement Box Canyon power. But if you want this witness to explain the resolutions and what led up to them, I don't think it is proper, counsel." (R. Tr. 932).

and again said:

“I think you have already established from Mr. Sewell what the purpose of it was.

“I think his testimony is objectionable, counsel, and I will sustain the objection to the offer of proof.” (R. Tr. 946).

At the close of the PUD's case, it will be seen that, due to the striking of the conclusions of value expressed by PUD's valuation witnesses, there was no valuation evidence in the record that included the element of power site value. As is demonstrated by the Findings of Fact, the PUD's evidence had been sufficient to establish that the highest and best use of the properties and rights being condemned was for hydroelectric power purposes (R. 93). The evidence also established that it would be necessary to acquire only a negligible amount of additional privately owned land in order to devote the PUD's properties and rights to the production of hydroelectric power, and that as concerns the proposed low Z Canyon project, such acquisitions could be made even though the developer did not have the right of eminent domain (R. 88, 95). Nevertheless, Seattle, having the right to open and close the testimony, did not in its rebuttal seek to offer any valuation evidence that considered this element of value (R. Tr. 1642-1756).

Following the close of the testimony and prior to entry of the Findings of Fact, Conclusions of Law,

and Judgment and Decree, the PUD moved the Court to reconsider the ruling striking the conclusions of value expressed by its valuation witnesses (R. 48-50). In denying the motion, the Court expressed the opinion that the only method available to the PUD to prove value was by proof of comparable sales (R. MTR).

Following the entry of the Judgment and Decree, awarding Seattle's opinion of value in the amount of \$16,000 as just compensation, PUD moved for a new trial on the grounds therein set forth (R. 100). This motion was denied (R. 105). PUD appealed (R. 106). Seattle cross-appealed (R. 109).

Specification of Error No. 1

Although PUD's ownership included all or practically all of the privately held lands and rights necessary for the development of a hydroelectric project with the dam, power house and related facilities located at either the Boundary site or the Z Canyon site, the District Court erroneously struck from the record the evidence submitted with reference to a project at the Boundary site.

PUD's witness, Allen, was permitted to testify that Seattle was, as of the date of taking, executing its plans to complete a hydroelectric project at the Boundary site utilizing shore lands, uplands and flowage rights owned by PUD. He was also permitted to testify as to the cost and capacity of such a project at the Boundary site based on actual data furnished voluntarily by Seattle or supported by public record and checked by the witness (R. Tr. 574-712, 715-16). The

place, he states that the report was written before he even visited the site.

“We, therefore, feel that, even outside of our other objections, which we feel are well taken, that the exhibit is not properly qualified.” (R. Tr. 627-28).

The Court sustained the objection and rejected the exhibit on the ground that it came too close to the rule that rejects evidence of value of the property to the condemnor (R. Tr. 629). PUD then made the following offer of proof:

“MR. ENNIS: The defendant PUD offers to prove by the testimony of Mr. Allen and Exhibit 130 that as of the date of trial, which is the date of taking, Seattle has completed plans and designs for a dam and powerhouse at the Boundary site and is executing those plans. This evidence is for the purpose of establishing the highest and best use of the PUD properties in the Z Canyon-Boundary area of the Pend Oreille River.

“PUD will further offer to prove the cost of the project proposed and being built by Seattle as of the date of taking and the capacity of the dam and powerhouse so proposed. This testimony will be based upon actual data supporting Seattle’s estimates and actual contracts entered into by Seattle which are a matter of public record or have voluntarily been supplied by Seattle and checked by Mr. Allen. The evidence will be offered as a typical project that could be built on the property in question at low cost and high capacity which goes directly to the availability of the PUD properties for that purpose.

“This offered proof does not show any enhancement of value by reason of anything done by Seattle, the condemnor, and is therefore not made inadmissible by *U. S. vs. Miller*.

“This evidence is not in any sense offered to prove any special value to Seattle as an element of market value, but is solely for the purpose of establishing by other and later witnesses that the use of the property for a power site is economically feasible and thus will be evidence going directly to proof of the highest and best use of the property. Such evidence is admissible under the rationale of the U. S. Supreme Court opinion of *Grand River Dam Authority vs. Grand Hydro*, Its admissibility is also supported by *Metropolitan Water District vs. Adams* and other authorities cited in Part Two of PUD’s trial brief.

“For the purposes of showing adaptability of the property for power site purposes and the reasonable possibility of the properties being used for that purpose, the defendant should not be confined to evidence pertaining to its own planned project. A purchaser of the PUD properties might and probably would consider the availability and possibilities of the Boundary site as well as the Z Canyon site. For this reason, testimony with reference to the Boundary project is admissible.” (R. Tr. 719-720)

This offer of proof was rejected (R. Tr. 721).

The Court erred:

(a) In limiting consideration of power site value to PUD’s properties and rights at the Z Canyon site, which is one mile upstream from, and will be inundated by the reservoir of, Seattle’s dam at the Boundary site;

(b) In striking the testimony of PUD’s witness, Arthur E. Allen, relative to the cost and capacity of a power project on the properties owned by the PUD

at the Boundary site which are included in this condemnation action:

(c) In rejecting PUD's Exhibit for Identification 130; and

(d) In rejecting PUD's offer of proof quoted above.

Specification of Error No. 2

The Court erred in striking the opinion of value of the properties and rights being condemned as expressed by the witness, John L. Vaughan, in the amount of \$8,600,000.00, and in rejecting the offer of proof hereinafter set out in full.

After stating his qualifications and during his direct examination wherein the manner in which he arrived at his opinion of value was stated in detail, the witness, Vaughan, testified:

“In my opinion, the fair market value of the entire property before the taking, is \$8,702,200.

“The fair market value of the property remaining after the taking is \$2,200, so the value of the property taken, is \$8,700,000.” (R. Tr. 1097.)

“So, I have made a judgment allowance of \$100,000 for the possible cost of acquiring these additional rights, and I have reduced my estimate of value from \$8,700,000 to \$8,600,000.” (R. Tr. 1100).

During the course of cross examination of the witness, Vaughan, the Court said:

“Now, the valuation has to be based upon fair market value, what a willing buyer would pay to a willing seller. He hasn't based his opinion on

that, and so if counsel wants to make his motion to strike, I will entertain it now." (R. Tr. 1236)

Seattle immediately moved to strike the testimony of the witness (R. Tr. 1235) on the grounds:

"No. 1, the witness has not used the proper approach to a fair market value valuation, in that he has simply taken a comparison of other hydro-electric projects and the costs incident to them from a document which is replete with second and third-hand hearsay, and using those figures, those hearsay figures, which do not come within the ambit of the standard kinds of hearsay which an appraiser is permitted to rely upon, has arrived at a project comparison calculation by which he, in essence, arrives at a figure which he believes, on the strength of what was paid at other projects in the Northwest and on the West Coast, a purchaser could pay for these PUD properties. Instead of being a figure based on comparables or on any other acceptable appraisal technique, the witness, relying on this hearsay information contained in this document, in essence, has told us what, in his opinion, a purchaser could pay for these properties, and on the ground that this is an improper appraisal technique from a legal standpoint, and on the ground that the basis which the witness used provides an insufficient legal foundation to support the opinion which he has given, we move to strike that opinion in its entirety." (R. Tr. 1236-37)

"It is also obvious, your Honor, from the very projects that the witness has now named that he used for comparison purposes, that the value he used are values paid by condemnors all over the Northwest, values which are the result of condemnation awards after jury verdicts, values which included attorneys' fees and court costs in connection with such condemnation, values paid by condemnors who settled the condemnation actions by

negotiating after they were started, all of the myriad of things which occur whenever a project such as those he has relied on goes through the land and land rights acquisition process.” (R. Tr. 1239).

The Court granted the motion to strike to the extent of striking the testimony quoted above (R. Tr. 1338).

PUD made the following offer of proof:

“MR ENNIS: We would offer to prove — I am trying to couch this — what we have offered to prove, what we think the witness already has testified to, but I will make it in that fashion, that we would offer to prove, and offer further that the proof of this witness already is, to the effect that he arrived at a money value of fair market value in this case as that value that would be agreed upon between a willing buyer and seller, as he described that, not taking into consideration the existence of a license, the existence of ownership of water rights on the river, or the existence of ownership of anything other than the lands that the PUD owned, and that he has referred to those lands as a bundle of rights that he thought had a value; that he arrived at an opinion of market value considering as one of the elements on the basis of what the highest and best use was, and that he then deducted from his original conception of what the value might be and expressed his opinion of value on the land in the condition that it is in, realizing that these other matters existed and that any reasonable buyer would have to acquire these, and so that he did not include them, he did not include the ownership of those things by the PUD or a purchaser in arriving at value; that the opinion of value he arrived at was exclusive of those; and we would offer that in the way of proof.” (R. Tr. 1284-86).

The Court rejected the offer of proof. (R. Tr. 1286).

A consideration of this assignment of error requires a review of testimony of the witness, Vaughan, upon which his stricken opinion of value was based. This testimony is lengthy and, for convenience of this Court, the witness' testimony on direct examination, except with reference to his qualifications, and pertinent portions of his cross-examination are set out in the appendix of this brief. (See Appendix pgs. 4-57)

Specification of Error No. 3

The Court erred in striking the opinion of value of the properties and rights being condemned as expressed by the witness, Neville C. Courtney, in the amount of \$7,498,000.

After stating his qualifications and during his direct examination wherein the manner in which he arrived at his opinion of value was stated in detail, the witness, Courtney, testified as follows:

“Q. (By Mr. Dill) What valuation did you put upon this property as a raw dam site, as an undeveloped dam site, along with the other properties of the PUD in the river?

“A. The amount of money in cash, as the fair market value, is \$7,500,000 before the taking, and \$7,498,000 after the taking. I valued the 191 acres — or the 110 acres, after the taking, as \$2,025, which I rounded out at \$2,000.” (R. Tr. 1398-99).

Seattle moved to strike the opinion of the witness quoted above as to the fair market value of PUD's properties in the following manner:

“MR. WHITE: Your Honor, it appears now from Mr. Courtney's testimony that he used almost precisely the method which your Honor rejected in connection with the witness Bleifuss, and I refer to Defendant's Exhibit 134, which is the same curve, which Mr. Courtney has now explained for us in words, which Mr. Bleifuss had as a line. He had on the lefthand column, you will remember, the mills per kilowatt-hour, and across the bottom, cost of lands and rights, millions of dollars, and showed what the interrelationship would be between what might be economically justifiable for the cost of land and land rights and how it affect the cost of power, and, in my judgment, the technique which Mr. Courtney has now said that he used is subject to exactly the same disabilities which we raised at the time of Mr. Bleifuss' testimony.

“It necessarily, of course, entails some, let's say, second-hand approach of capitalization of earnings, as Mr. Bleifuss approached it, since the direct line would be meaningless without having the mills per kilowatt-hour compared with some other project, which are unidentified, and we move to strike Mr. Courtney's testimony as to value on several additional grounds.

“First, that to this point, there has been no showing that the lands necessary for the construction of a project at Z Canyon could be assembled within the reasonably near future without the power of condemnation. And your Honor adverted to that fact and that state of the record as late as yesterday, and nothing, of course, that Mr. Courtney has done or any study that was made by him — although it might have been made by him, it

hasn't been made — nothing Mr. Courtney has done changes that record.

“Next, we would add an additional ground, that Mr. Courtney has, in his testimony this morning, indicated that he took into consideration the factor, assumed, that the PUD would have the right to store the waters of the Pend Oreille River and also to divert them through penstocks and intake structures through the powerhouse, and this was, I think, a very significant factor which your Honor discussed in connection with the ruling which you made upon our motion to strike Mr. Vaughan's testimony.

“Now that we have out in the record the back-up, so to speak, for the figure of seven and-a-half million dollars, it appears that Mr. Courtney's testimony should not be permitted to stay in the record.

“I recognize that he also said something about using the total land in relation to the cost of the project, which I can only interpret from this previous testimony as meaning that he used this comparative approach, using the projects which he named, and he said this morning that he used substantially the same approach as was described by Mr. Vaughan, and, as Mr. Helsell said yesterday, the two principal problems with that approach are, first, that it is based upon compound hearsay and, second, it is based upon wholesale consideration of transactions which your Honor could not consider one by one. In other words, it is trying to get into the record a great many transactions involving condemnors and condemnees which would not be admissible if they were presented on a comparable sales basis, and the mere fact that they are more or less homogenized or averaged in order to come at some figure which might take out the sting of a particular one, it seems to me all it does is compound the inadmissibility, because we couldn't pos-

sibly know what went into all of these transactions without doing what we explained yesterday would be necessary to do, to call the Comptrollers of the various utilities in question and find out from them the facts concerning these transactions.

“Basically, too, Mr. Courtney’s approach is what a dam owner could pay, rather than what he would pay. In other words, he had equated the two between ‘could’ and ‘would’ without really any adequate explanation of how he gets from ‘could’ to ‘would.’ In fact, as he describes it, there really is no judgment factor other than his picking a particular point out on a curve, which I gather is a point which he feels would be what a prospective dam proprietor could pay and still have the project competitive and reasonably attractive, rather than what the actual value of these properties which we have in litigation here is.” (R. Tr. 1460-64).

In ruling on the motion, the Court said:

“I think that this testimony is not fundamentally sound, counsel, on the matter of value. It isn’t a comparable sale approach, it isn’t a capitalization approach, which you said was not to be used, or Mr. Ennis did. Of course, it can’t be a reproduction cost approach.

“I think there has to be some basis upon which an amount is determined, and to place it on the basis of taking a piece of raw land and theoretically building a plant and theoretically selling the power becomes a pyramiding on nothing, on the raw land, and there is no plant there. I think this is testimony that cannot be used, as I view it, recognizing the tremendous qualifications of this man.” (R. Tr. 1495-96).

A consideration of this assignment of error requires a review of the testimony of the witness, Courtney,

upon which his stricken opinion of value was based. This testimony is lengthy and, for the convenience of the Court, pertinent portions thereof are set out in the appendix of this brief. (See Appendix pgs. 58-98)

Specification of Error No. 4

PUD established in its case that the highest and best use of the properties and rights being condemned was for hydroelectric power purposes (R. 93) and that their use for that purpose was reasonably probable (R. 88, 89, 93, 95). PUD also established that it had acquired the said properties and rights for use in the development of water power and that Seattle is acquiring them for that purpose. The Court found that the valuation expressed by Seattle's valuation witnesses in Seattle's case in chief ignored the element of power site value (R. 94). After the conclusion of value as expressed by PUD's valuation witnesses had been stricken, Seattle proceeded with its closing case and failed and refrained from offering evidence of value which considered the element of power site value (R. Tr. 1624-1756).

Considering the posture of the case upon its completion, the Court erred in entering a judgment and decree in condemnation which contained an award that admittedly did not constitute just compensation.

Specification of Error No. 5

Following the close of the testimony and prior to entry of Findings of Fact, Conclusions of Law, and

Judgment and Decree, PUD moved the Court to reconsider the ruling striking the conclusions of value expressed by its valuation witnesses. In denying this motion, the Court said:

“I thought that the valuations placed on the properties by the valuation witnesses presented by the PUD were not on a fundamentally correct basis. I felt that the only basis upon which the property could be valued was on the basis of comparables or opinion evidence based upon some comparable properties.” (R. MTR)

The Court erred in denying PUD’s motion to reconsider above referred to.

Specification of Error No. 6

The Court erred in its pretrial ruling that PUD could not submit evidence as to severance damage; and during trial, by adhering to the pretrial ruling, the Court compounded the original error.

At the hearing on the pretrial order, PUD proposed to be permitted to offer evidence of severance damages by showing how the PUD’s planned use of the properties taken would, among other things, firm up the loss of power at its Box Canyon dam which high water causes each year, and that, therefore, the taking of that property would substantially reduce the value of the remainder of its power production properties. Seattle, in its pretrial brief, objected, claiming the taking of the property was simply frustration of PUD’s plan to construct a dam at Z Canyon. The Court ruled that “there should not be submitted to

the jury any evidence on the question of severance damages." (R. HPO 133.)

As pointed out in the statement of the case (p. 30, supra), the Court compounded its pretrial error by striking the testimony of PUD's engineer, Sewell, wherein he pointed out that studies he had made in connection with PUD's Box Canyon dam showed that high water would reduce power production and finally cause the Box Canyon plant to go out of operating production. the witness testified that it was planned to use the excess power which the high water could be made to produce at a Z Canyon plant to meet the deficiencies at Box Canyon.

The motion to strike Mr. Sewell's testimony in this regard was made and sustained on the ground that such planning by the PUD could only be proven by official resolutions of PUD Commissioners and not by the PUD Engineer. (R. Tr. 448-9).

The pretrial error was again compounded when the Court, because of Seattle's objections, including the objection that it pertained to severance damages (R. Tr. 894), refused to permit the PUD to establish, through its manager, V. P. Campbell, that the properties being condemned in this action had been acquired with Box Canyon construction funds with the approval of the lender, R.F.C., at the time of construction of the Box Canyon dam as additions and betterments thereto in that a dam and power plant at Z Canyon would not only be a source of power during periods of high

water when the Box Canyon must shut down, it would make possible a coordinated operation during other times of the year (R. Tr. 889-946).

PUD made the following offer of proof:

“In view of counsel’s statement that the City of Seattle would now contend that the PUD could not legally proceed with the development of Z Canyon project, the PUD would offer to show that at the time of the acquisition of the Z Canyon properties, the commissioners were aware of a continuous deficiency in the Box Canyon project, in that in periods of high water, the Box Canyon project would have to shut down; that the commissioner is determined to firm up this deficiency by adding the Z Canyon project to its program and coordinate it with the Box Canyon project: that the commissioners had authorized studies and had estimates of future power needs of the District which justified their plan; that they were aware that the Z Canyon project could be built in stages, and its capacity increased from time to time; that it purchased the Z Canyon project with funds which were authorized from the Box Canyon project, with the approval of the RFC, who were supplying the funds originally; after the RFC made its own engineering investigations and determined that the proposed Z Canyon project was in fact a contemplated extension of the Box Canyon development.” (R. Tr. 938-39)

The Court continued the error by rejecting the offer of proof and ruled that the only proof that would be acceptable would be the actual contents of resolutions duly adopted by the Commissioners of the PUD and that Mr. Campbell’s oral testimony would not be admissible to explain or add to the recorded actions of the Commissioners (R. Tr. 945-46).

Specification of Error No. 7

The PUD moved for a new trial on the following grounds:

“1. The Court erred in admitting and considering the testimony of plaintiff’s witnesses as to the fair market value of the land in question.

“2. The Court erred in refusing to admit the testimony of defendant’s witnesses as to the fair market value of the land in question.

“3. The judgment is contrary to law in that it does not afford the defendant just compensation for the taking of its property.” (R. 100)

This motion was denied (R. 105).

The Court erred in denying PUD’s motion for new trial.

ARGUMENT

Part I. of this brief will discuss the admissibility of evidence with reference to the valuation of the properties and rights being condemned and the propriety of entering a judgment and decree based upon the valuation estimates submitted by Seattle which failed to consider the highest and best use of the property. This will include a consideration of Specifications of Error 1, 2, 3, 4, 5, and 7. Part II. will discuss the rulings of the Court with reference to the PUD’s claim of severance damage and will include a consideration of Specifications of Error 6 and 7.

PART I.

Briefly stated, it is the position of PUD that the Findings of Fact and Conclusions of Law entered in this case (R. 80-95) clearly establish that this action involves the condemnation of all or practically all of the private lands and rights in, on and along a navigable stream constituting an integrated site uniquely adaptable, sufficient, and proven to be suited as the location for a dam, power house, and reservoir area whereat hydroelectric power and energy could be produced in quantity, at a very low cost. The Findings of Fact and Conclusions of Law also establish that PUD not only acquired the lands and rights for such purposes, but had completed plans for a hydroelectric project and was prepared to carry them out; and it is reasonably probable that, but for the taking of the properties and rights, the PUD or its purchaser would have done so in the the reasonably near future. Under such circumstances and when, because of the unique character of the integrated properties and rights, there are no comparable sales for the witnesses to consider in the determination of market value, the methods used by PUD's valuation witnesses to arrive at an opinion of value were proper; and their conclusions of value should not have been stricken.

The District Court ruled at the pretrial hearing that PUD was entitled to have its lands and rights "evaluated as in the *Powelson* case and in the *Grand*

River Dam Authority case for power site purposes.” (R. HPO 132).

At the trial the Court took the position that the only method available to prove such value was by proof of comparable sales. In ruling on PUD’s motion to reconsider the order striking the conclusions of value expressed by the witnesses Vaughan and Courtney, the Court said, “I felt that the only basis upon which the property could be valued was on the basis of comparables or upon evidence based upon some comparable properties.” (R. MTR). In order to afford an idea as to value, compared property must be truly comparable; it must be located in the same geographical area; and the sale must be reasonably near in time. Under the Court’s view and even though it was established, as it was in this case, that the highest and best use of the properties being taken was for power site purposes inasmuch as they were uniquely adaptable as the site for a low-cost, high-capacity hydroelectric project, PUD would be deprived of just compensation unless it could produce evidence of a sale or sales reasonably near in time and location of all or practically all the privately owned lands on and along a navigable stream similar in flow to the Pend Oreille River that would be needed to serve as the site of a hydroelectric project that could be built, maintained, and operated at a cost and with a production capacity similar to the cost and capacity of such a project as could be built, maintained, and operated on the PUD lands. There are, of course, no properties and rights

so meeting the test of comparability that have been sold as a unit; and the witnesses so testified (R. Tr. 1083, 1339).

The non-existence of comparables is graphically demonstrated by the following colloquy that took place between the Court and counsel for Seattle at the time of the settlement of the Findings of Fact on January 20, 1965, when reference was being made to the Z Canyon and Boundary sites:

“THE COURT: Do you know of any place in the Northwest where there are two power sites this close together as these two are? And as good as these two?”

“MR. WHITE: As close together and as good?”

THE COURT: Yes.

“MR. WHITE: Well, I don’t know. I suppose there are but I can’t think of any offhand.” (R. PCF 17).

In addition to the shore lands and uplands owned in fee simple which are included in the property being taken, a comparable situation would have to also include the right owned by PUD and evidenced by Exhibit P. 1. This right was a perpetual right granted by the State of Washington in 1913 pursuant to the provisions of Chapter 125 of the Sessions Laws of 1907, which authorized the granting of rights

“to perpetually back and hold water upon and over any land belonging to the State of Washington, and to overflow any such land and inundate the same, if it be necessary in the erection, construction, maintenance, or operation of any water

power plant, reservoir or works for impounding water for power purposes . . . ” (This act is set out in full in the appendix at p. 99)

The state-owned shore lands affected by the grant extend on both sides of the Pend Oreille River upstream from the Z Canyon site a distance of some 17 miles to the Box Canyon site. From the physical feature of Metaline Falls in the river upstream to the Box Canyon dam, the outer boundaries of the shorelands coincide with the outer boundaries of the reservoir area for the Boundary dam project. (Exs. P. 12-13-14-15)

At the time of the issuance of the order, the State of Washington was not only the owner of the shore lands, it was the owner of the waters of the Pend Oreille River. (*Port of Seattle v. Oregon & Washington Railroad Company et al.*, 255 U. S. 56). This perpetual right was created prior to the adoption in 1917 of a code in the State of Washington establishing appropriation rights and procedures, and no other state grants were then necessary in connection with the erection and operation of a dam in the Pend Oreille River and the use of the waters thereof for water power purposes. In *State ex rel. Mason County Power Company v. The Superior Court*, 99 Wash. 496, 169 P. 994, the Court, in referring to the 1907 laws, said at p. 498 of the Washington report:

“We find no other statute in the laws of this State permitting either a corporation or a private individual to acquire State lands or any rights therein for the same purpose as those involved herein.”

The first section of the water code above referred to declares the rights and procedures established by such code to be subject to existing rights. (RCW 90.03.010).

The creation of this perpetual right also preceded the enactment of the Federal Power Act in 1920. Section 27 of this Act, 16 USCA 821, reads as follows:

“STATE LAWS AND WATER RIGHTS UNAFFECTED.

“Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the *control*, appropriation, use, or distribution of water used in irrigation or *for municipal or other uses, or any vested right acquired therein.*” (Emphasis supplied.)

It is said in *Federal Power Com. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 98 L. Ed. at page 671 of the L. Ed.:

“The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. We agree with the Court of Appeals that it has not.”

and again at page 676:

“The issue is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use water of the Niagara River.”

The fact that the case at bar involves valuable perpetual rights created fifty years ago, saved to the owner by both the Washington water code and the Federal Power Act, as well as the fact that the site has an exceptionally unique terrain and river profile which permits the concentration of head on a stream with ample flow, demonstrates most clearly why the situation is incomparable.

In adhering to the proposition that there are only three approved methods of valuation in condemnation; namely, capitalization of income, reproduction cost, and comparable sales (R. Tr. 1495), and that the comparable sales approach was the only one available to the PUD in this case (R. MTR), the District Court failed to recognize that over the years the concept of market value and the methods of determining just compensation have undergone considerable evolution, particularly with reference to unique properties and rights.

The following statement by Justice Frankfurter in *Kimball Laundry Co. v. U. S.*, 338 U. S. 1, at page 6, is often quoted:

“But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the ‘market price’

becomes so important a standard of reference. *But when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights.*" (Emphasis supplied).

The Court said in *United States v. Cors*, 337 U. S. 325, at 332:

"The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. *United States v. Miller*, 317 U.S. 369, 374 But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases."

The Seventh Circuit Court of Appeals said in *United States v. 93.970 Acres*, 258 F. 2d 17, at p. 28:

"The general rule undoubtedly is that just compensation is to be determined by the fair cash market value of the property at the time of taking. The cases, however, recognize that this rule cannot be adhered to in situations where the property taken is unique. See *United States v. Two Acres of Land*, 7 Cir., 144 F. 2nd 207; *City of Chicago v. Farwell*, 286 Ill. 415, 121 N. E. 795; *Sanitary District of Chicago v. Pittsburgh, Ft. Wayne and Chicago Ry. Co.*, 216 Ill. 575, 75 N.E. 248, and *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463."

This Court in 1957 said in the case of *Phillips v. United States*, 243 F. 2d 1, at p. 2:

"Never niggardly in its standards for the compensation of the expropriated landowner, the Supreme Court has grown progressively more liberal in its canons for the reimbursement of those

who are dispossessed through the exercise of the right of eminent domain.”

In *Washington Water Power Co. v. U. S.*, 135 F 2d 541, wherein the manner of proving the valuation of undeveloped property useful for power site purposes was being discussed, this Court also said at p. 542:

“The property in question is the kind where actual sales cannot be used as the basis for ascertaining ‘market value.’ In such cases appraisals are made and the jury decides from the various appraisals and other evidence, what the ‘market value’ is.”

After the District Court had ruled at the pretrial hearing that PUD was to be permitted to prove power site value as an element of value of its properties and rights (R. HPO 132), PUD set out to make such proof in the same way as had been done in other cases hereinafter cited that involved the valuation of undeveloped hydroelectric power sites. It should be remembered that the Z Canyon site was in fact partially developed in that its suitability to support a dam had been established by tunneling and test drilling. (R. Tr. 435, Ex. D. 112).

In preparing for trial and offering its proof of valuation, PUD gave careful consideration to the *Twin City* litigation above referred to. This litigation involved practically all of the land needed for the development of a power project having a sixty-foot head. These undeveloped lands extended eleven miles along both sides of the Savannah River and were located in the States of Georgia and South Carolina. For this

reason, the litigation involved court proceedings in the Western District of South Carolina, the Southern District of Georgia, the United States Court of Appeals for both the Fourth and Fifth Circuits, as well as in the United States Supreme Court. This litigation is found in the following citations: *U. S. v. 1532.63 Acres et al*, 86 F. Supp. 467 (1949); *U. S. v. 3928.09 Acres et al.*, 12 F. RD 127 (1951); *U.S. v. 3928.09 Acres of Land et al.*, 114 F. Supp. 719 (1953); *U.S. v. Twin City Power Co. et al.*, 215 F. 2d 592 (CCA 4th Cir., 1954); *U.S. v. Twin City Power Co. of Georgia*, 221 F. 2d 299 (CCA 5th Cir., 1955); *U.S. v. Twin City Power Co.*, 350 U.S. 222, 100 L. Ed. 240, 76 Sup. Ct. 259 (1956).

Except that in the *Twin City* cases the condemnor was the United States and the site was suitable for a development of a project with a 60 foot head as distinguished from a head of 255 feet at the Z Canyon site and a 261 foot head at the Boundary site, the facts in *Twin City* are in many respects similar to the facts in the case at bar. The facts in *Twin City*, including the manner in which the undeveloped power site properties and rights were evaluated and appraised, are set out at length and in detail in the District Court and Circuit Court of Appeals decisions above cited. A careful review of these opinions and the excerpts from the Report of Commissioners, direct testimony of owners' valuation witnesses, and accompanying exhibit, which are contained in the appendix to this brief, is respectfully urged. (See Appendix pgs. 100-150)

It will be seen that in *Twin City* the valuation witnesses, with the approval of the Commissioners and the District and Circuit Courts of Appeal, did the very thing in arriving at opinions of value which the District Court in the case at bar found to be objectionable. After concluding that the highest and best use of the undeveloped properties considered as an integrated unit was for power site purposes, the witness, Dr. William P. Creager, whose qualifications are also tremendous, listed 19 factors which he took into consideration (Appendix pgs. 118-121). He not only considered the cost of construction of a hydroelectric plant exclusive of the cost of site, its capacity, and the cost of producing power, he did the same thing for a hypothetical steam plant. As shown in the Commissioner's report (Appendix pgs. 100-108). Dr. Creager determined that the annual cost of producing hydro power at a contemplated project on the undeveloped lands was \$139,000 less than the annual cost of producing a like amount of power by steam. He capitalized this sum at 6 percent, which gave the potentially-integrated power site a theoretical value of approximately \$2,300,000. (Appendix pgs. 105-106. From this figure, the witness deducted \$700,000 "to cover fluctuations in market, the risk that a prospective developer of this project would have to take, fluctuations in demand for power, additional lands that would have to be acquired to complete the project, and other factors best known" to him and arrived at an opinion of value in the amount of \$1,600,000. (See Appendix

page 106). The Commissioners concluded, "In our opinion, this represents a sound basis for arriving at the value of the lands taken from Twin City, and the just compensation to which it is entitled . . . " (Appendix pgs. 106-107).

The witness, Johnson, explained Ex. 40 (Appendix pgs. 124-128). In his consideration of his opinion of value, this witness, as did Mr. Vaughan in the case at bar, calculated the annual land cost per kilowatt installed capacity of 11 plants in the Santee River System and arrived at an average land cost per kilowatt installed capacity. By comparing this with the installed capacity of a proposed project on the Twin City site, the witness determined that his opinion of value of \$1,500,000 was completely justified. (Appendix pgs. 136, 151).

A comparison of Mr. Courtney's testimony in *Twin City* (Appendix pgs. 136-150) with his testimony in this case (Appendix pgs. 58-98) will show that he used a similar approach in arriving at his opinion of value.

It is recognized that the United States Supreme Court reversed the District Courts and Circuit Courts of Appeal decisions in *Twin City*. This was due to the opinion held by the Supreme Court that the doctrine of dominant servitude over navigable streams held by the United States made it improper to require the federal government to pay anything for power site value. However, the manner in which that value had been arrived at by the Commissioners and approved

by the District Courts and Circuit Courts of Appeal was not disturbed.

The *Grand Hydro* litigation, referred to as a proper guide for valuation by the District Court at the pretrial hearing herein, is found in the following citations: *Grand-Hydro v. Grand River Dam Authority*, 139 P. 2d 798; *Grand River Dam Authority v. Grand Hydro*, 201 P. 2d 225; *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359, 93 L. Ed. 64, 69 Sup. Ct. 114.

The Grand Dam Authority, holding a permit from the State of Oklahoma to build the Pensacola hydro on the Grand River, filed a declaration of intent under the Power Act on which the Commission determined on February, 11, 1938, that interstate commerce would be affected and, therefore, a F.P.C. license was required.

In February, 1939, it started this condemnation suit under state law to acquire 1400 acres of land, which included the dam site. The F.P.C. license was issued on July 26, 1939.

Commissioners made an award of \$280,000.00. Both sides appealed. The jury found \$136,000.00. On the landowners' appeal, the Supreme Court reversed (192 Okla. 693, 139 P. (2d) 798) for the following reason:

“Grand Hydro pursued the proper course for determining the market value of the land. It produced witnesses qualified to give their opinion as to that value from the standpoint of adaptability of the land to every use which Grand Hydro might reasonably employ the same. Among those uses

was that of dam construction for the development of hydro-electric power for public use. Grand Hydro produced qualified witnesses who gave their opinion as to the market value of the land for the latter purpose, but their testimony was withdrawn by the court and the jury admonished not to consider the same. The ground assigned for such procedure was that the adaptability of the land to damsite purposes was not an element of market value. In this the court erred."

The retrial resulted in a judgment on a jury verdict of \$800,000.00. The State Supreme Court (201 P. (2d) 228) affirmed, saying:

"The testimony of the expert witnesses as introduced was, therefore, competent to prove the dam site value of the property and was in accord with our opinion on the former appeal. To the same effect is the California case of Metropolitan Water Dist. of Southern California v. Adams et al., Cal. Sup., 116 P. 2d 7, wherein there is an extensive discussion of many of the points herein involved and a collection of many authorities on the subject."

In affirming the Oklahoma Supreme Court, the United States Supreme Court said at p. 361 of the U. S. Report:

"The federal question in this action for condemnation under Oklahoma law is whether the Federal Power Act had so far affected the use or value of certain land for power site purposes as to render inadmissible expert testimony which gave recognition to that land's availability for a power site. We hold that it had not. We thus see no adequate reason to reverse the Supreme Court of Oklahoma which had held that such testimony was properly admitted in a state condemnation proceeding."

At p. 369 the United States Supreme Court quotes that portion of the opinion of the Oklahoma Supreme Court with reference to the competency of the testimony of the expert witnesses which is hereinabove set out.

The testimony of the *Grand Hydro* valuation witnesses is contained in the document designated as D-I-144 and submitted to this Court under Supplemental Designation of Contents of Record on Appeal. It will be noted that the verbatim testimony of the valuation witnesses was before the U. S. Supreme Court in the *Grand Hydro* litigation. Portions of this testimony selected as pertinent are included in the Appendix (Appendix pgs. 152-199). A comparison is urged of the manner in which these witnesses arrived at their opinions of value with the manner in which the witnesses in the case at bar arrived at their valuation opinions. When this is done, it will be apparent that, although the methods used are in many respects similar, the testimony of the witnesses Vaughan and Courtney is more practical and acceptable and more within recognized standards in this regard than was the testimony in the *Grand Hydro* litigation.

The Supreme Court in *Grand Hydro*, at p. 372 of Vol. 335 of the U. S. Reports, said:

“The present large development of this site by the petitioner under a federal license is *convincing proof of the value and availability of the land for that purpose.*” (Emphasis supplied.)

plan to subdivide the land for dwelling, business, and truck garden sites, which, according to the owner's witnesses, was the highest and best use of the land. These witnesses arrived at their opinions of value by capitalizing the estimated income from the land assuming it had been improved as a subdivision. This Court held such valuation testimony to be admissible because the use of the land as testified to was a "use for which the property is adaptable and needed or likely to be needed in the reasonably near future." As shown by the evidence, the Findings of Fact and Conclusions of Law, the case at bar comes within the rule stated in the cited case. Nevertheless, the District Court refused to permit similar testimony (R. Tr. 1627).

Additional authorities supporting the manner in which Mr. Vaughan and Mr. Courtney arrived at opinions of value are *U. S. v. 25.406 Acres of Land*, 172 F. 2d 990 (CCA 4th), and *Metropolitan Water District v. Adams*, 116 P. 2d 7.

Part I. of this brief will be concluded by pointing out that when the PUD in its case established that the highest and best use of its lands and rights was for power site purposes and that this use was sufficiently probable as to affect the market value of the property, and particularly after the conclusions of value as expressed by PUD's witnesses were stricken, it was then incumbent upon Seattle in rebutting the PUD's case to place in the record evidence of value which took

into consideration the highest and best use of the property. Its failure to do so leaves a void in the evidence which makes it impossible for the Court to make an award for the taking of property in accordance with the Fifth Amendment to the Constitution. It was said in *U. S. v. Twin City Power Co.*, 215 F. (2d) 592, at 596:

“It is provided by the Fifth Amendment to the Constitution of the United States that private property shall not be taken for public use ‘without just compensation’; and in arriving at just compensation *all elements entering into the value of the property taken must be given consideration*. The most profitable use of the land here being taken is use in the development of water power; and there is no basis in law or in reason why this element of value should be ignored. The land was acquired by the owner for that purpose; and it is now being acquired by the United States for that purpose.” (Emphasis supplied.)

PART II. SEVERANCE

There was error in the Court's ruling in the Pre-Trial Hearing that no evidence be submitted on the question of severance damages (R. HPO 133).

The pre-trial error was the basic error on this subject. Adherence to that error caused the court to commit a number of errors as the trial progressed that compounded that error. The prohibition against *submission* of evidence on the question of severance damages was made before any evidence had been offered.

The Court could not possibly be aware of all the facts necessary to such a ruling.

This ruling conflicts with the general rule that when the taking of the property of an owner reduces the value of the part remaining, severance damages should be awarded. 4 *Nichols, Eminent Domain* 839, Sec. 1545, Partial Taking of a Utility; 29 CJS, Eminent Domain, sec. 140; *West Virginia Pulp and Paper Co. v. U. S.*, 200 F. (2d) 100 (4th Circuit); *U. S. v. Sharp*, 191 U.S. 549; and *U.S. v. Pope and Talbot, Inc.*, 293 F. (2d) 822 (9th Circuit) 1961; *Campbell v. U.S.*, 266 U.S. 368). The Court should first hear the evidence to determine whether or not the rule applied.

This exclusion of evidence was in direct conflict with the salutary and sensible pronouncement of the United States Supreme Court in *United States v. Sharp*, 191 U.S. 341, wherein the court said at page 352:

“We must see therefore, what those facts are *in order to intelligently determine the applicability of the rule asserted by the plaintiff in error.*”
(Emphasis supplied.)

It conflicts also with the rule as to determination of value of property being condemned as stated by the Supreme Court in the case of *Campbell v. U.S.*, 266, U.S. 368, in affirming the award by the lower court of \$750 for 1.81 acres taken and \$2,250 for damage to the remaining lands owned by Campbell. The Court quoted at page 371 the rule that has become recognized

as controlling in all courts, namely:

“just compensation is safeguarded by the Fifth Amendment to the Constitution, that is, the value of the land taken and the damages inflicted by the taking is in such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken, *Seaboard Air Line, Seaboard Ry. Co. v. U.S.*, 261, U.S. 299 304.”

The PUD established at the trial that while constructing the Box Canyon dam, it acquired from the Cooper estate as a part of the same package not only the perpetual rights to back the water upon and overflow the shore lands lying upstream from the Box Canyon dam site which were necessary to the Box Canyon project, but it also acquired all of the downstream rights which are being condemned in this action and that the properties constitute a united whole of public utility properties. Furthermore, this package included Colonel Cooper's drawings, engineering data, and development work, acquired by the PUD as a part of its plan for the development of a dam and power house at the Z Canyon site (R. 35). Colonel Cooper had proved the solidness and soundness of the foundation of the Z Canyon dam site. This was an established fact (Finding of Fact XVI, R. 91-2).

Had PUD been permitted to do so, it would have established additional facts which, when considered with facts already proven, would bring the case at

bar within the holding of the Court in *West Virginia Pulp & Paper Co. v. U. S.*, 200 F. 2d 100 (4th Cir., 1952). In the cited case, it is recognized that the rule of severance damage is applicable when a portion of properties, all of which have been acquired and integrated by plans for a particular use, are taken even though the portion so taken has not yet in fact been actually devoted to the planned use. At p. 103 of the citation, the Court said:

“The company complains, also, because the trial judge excluded evidence tending to show that the company had acquired the tract of land part of which was taken, together with adjacent lands, the whole comprising a total of approximately 413 acres, as a site for plant expansion and that the whole was needed for the construction of a pulp dissolving plant the construction of which had been authorized by the company and was being delayed only because of difficulty in securing necessary materials. We think that this testimony was admissible for the purpose of showing that the contiguous tracts of land acquired by the company had been acquired for the purpose named and had been integrated for that purpose into a single tract so that depreciation in the value of the entire tract could be considered by the jury in making its award.”

and again said at page 104:

“ ‘If, however, several contiguous lots or tracts in reality constitute an entire parcel used for one general purpose by the common owner, the inquiry should embrace all injuries which will be caused to the entire body of land.’ ” 20 C.J. 735, 736; 29 C.J.S. Eminent Domain, Sec. 140, page 981; 18 Am. Jur. 910; note 6 A.L.R. 2d 1197, 1230.”

In the case of *U.S. v. Pope and Talbot, Inc.*, 293 F. (2d) 822, this Court cited the *Pulp* case and said its reasoning was controlling.

If PUD had not been stopped at the threshold, it would have shown that when it was building its Box Canyon plant it was aware of deficiencies that would cause Box Canyon to go out of production in periods of high water, which could be remedied by a plant at Z Canyon. Other benefits to Box Canyon's power production capabilities would also have been shown to result from a coordinated operation with such a downstream plant. The showing would be made that the downstream properties being taken by Seattle were acquired with Box Canyon construction funds as additions and betterments to the Box Canyon project with the approval of the lender, R.F.C. The Court compounded its original mistake by rejecting Construction and Acquisition Resolution (D-I-118 - R. Tr. 893).

It would also have been shown that, due to the unusual topography of the Z Canyon-Boundary area being condemned, in combination with stream-flow fluctuations, the same high water which destroys production at PUD's Box Canyon dam and thereby destroys the ability of Box Canyon to provide a firm uninterrupted load to its customers by the increased head at the narrow Z Canyon dam would be made to produce power at PUD's proposed Z Canyon project in excess of its annual firm power capabilities. This situation is unique in that the excess power at Z Can-

yon could be used without any additional cost to the PUD, since it would be available at the exact time it is needed at Box Canyon. Such a showing would make the doctrine of severance damage particularly applicable. In other words, the market value of all of the PUD properties on the river, considered as an integrated unit in common ownership, would be greater than would be the combined market value of both the Z Canyon properties and Box Canyon properties if owned or sold separately.

It was not PUD's purpose to show special damage it might have suffered because its Z Canyon plans were frustrated. It did propose, however, to show that its remaining power producing property, the Box Canyon project, would be depreciated in value by reason of the severance of the downstream properties.

The facts set forth in this case fit perfectly into the principles which the courts have so often stated as applying to the facts in each case which was then being considered. We have here:

First, the unity of ownership in the PUD of both the Box Canyon plant and the properties purchased.

Second, the contiguity of the properties to the Box Canyon dam properties, both above and below the dam, made a complete whole of this public utility. One part is already producing power and the other part of it was planned to be used to produce power to firm up the loss of power by high water at the producing plant.

Third, the PUD had plans fully developed for a dam at Z Canyon. It is in fact a partially developed dam site. The PUD had directed the manager to apply for a Z Canyon license. (D.-E-122).

Counsel for PUD has been unable to find a case involving a combination of river flow and such unusual topography of the areas of property taken and property remaining in relation to hydroelectric power production as in the instant case. This is due probably to the fact that no such a contrast in topographical condition exists where hydroelectric power is produced. There is no comparable. To that extent, this may be said to be the case of first impression. The fact that this is a hydroelectric reduction in value instead of land depreciation does not affect the application of the same principles relating to severance damages here.

The trial court's ruling excluding all evidence on the subject of severance damages should be reversed and the case remanded with direction to admit such evidence in order to be able "to intelligently determine" whether severance, damages should be allowed, and if so, the amount of such damages.

CONCLUSION

It has been established in this case by the testimony of such world-renowned hydroelectric engineers as Neville C. Courtney and Donald J. Bleifuss, the testimony given and exhibits prepared by Arthur E. Allen, head of the Engineering and Planning Department of Harza Engineering Co., recognized as one

of the outstanding dam-building organizations in the world, the testimony of the well-qualified appraisal specialist, John L. Vaughan, as well as by photographs, maps, and other visual evidence, that the properties and rights owned by PUD and condemned herein by its erstwhile big brother constitute one of the best, most unique, and incomparable sites for a hydroelectric project that can be found anywhere. That the properties would be used for power site purposes was as certain as that the night follows the day.

Common sense dictates that had these properties and rights been the subject matter of a voluntary transfer both the buyer and seller would have gone through the same procedures and taken the same things into consideration in arriving at price as did the highly qualified and experienced valuation witnesses called by the PUD.

“As was well said by the late Judge Henry G. Connor, one of the great judges of this Circuit, ‘It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.’ ” *United States v. 25,406 Acres of Land, etc.*, 172 F. 2d 990 at p. 993.

To say that inapplicable, fictional, and artificial formulas or rules make it impossible to arrive at a fair value is to make a mockery in this case of the constitutional guarantee of just compensation. As was so aptly said in the case last above quoted, at page 995:

“Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result. In no

branch of the law is it more important to remember this, than in cases involving the valuation of property, where 'at best, evidence of value is largely a matter of opinion., See *Montana R. Co. v. Warren*, 137 U.S. 348, 352, 11 S. Ct. 96, 34 L. Ed. 681."

The Judgment and Decree of the District Court should be reversed; the only evidence offered that considers power site value which was stricken should be reinstated in the record, and this Court should enter a Judgment and Decree awarding just compensation to PUD based upon that evidence; and the cause should then be remanded for further proceedings in the District Court for consideration of severance damage.

In the alternative, the Judgment and Decree of the District Court should be reversed and the cause remanded for new or further trial with instructions that the evidence offered by PUD with reference to valuation as set out in the specifications of error is competent, material, and admissible, and that the fact that the PUD's properties being taken were not yet actually being devoted to the purposes for which they were acquired does not rule out the applicability of the principle of severance damage to the balance of PUD's power-producing properties.

Respectfully submitted,

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EXHIBIT APPENDIX

Exhibit No.	Description	R. Tr. Page Admitted
P- 1	Order Dated 6-14-13	34
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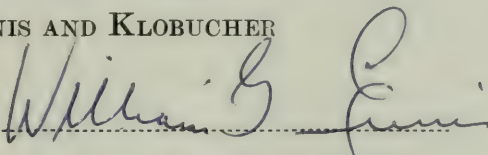
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


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Appellant-Appellee

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EXPLANATORY NOTE

Pursuant to the stipulation of July 16, 1965, the appellant-appellee, Public Utility District No. 1 of Pend Oreille County (PUD), submits this final brief in two parts. Part I. is PUD's reply to the answering brief of the City of Seattle (Seattle) as appellee. Part II. is PUD's answer to the opening brief of Seattle as appellant. Designation to the record will be made in the same manner as was done in PUD's opening brief.

PART I.

REPLY TO ANSWERING BRIEF OF SEATTLE AS APPELLEE

Comments Re Seattle's Counterstatement of the Case:

On pages 2 to 6 of its answering brief, Seattle seeks to create the impression that in the license application proceedings before the Federal Power Commission and in the appeal of the Commissioner's

Order to the Court of Appeals for the District of Columbia, and in the so-called Beezer litigation in the state courts of Washington, there was a determination that the PUD's properties being here condemned were not "electrical" properties or useful as electrical properties. The fact is that the decision of the Federal Power Commission (Ex. P. 9) says on page 6:

"The evidence shows that certain portions of the bed and banks of the Pend Oreille River owned by the PUD are indispensable to construction of the City's proposed Boundary project,"

and on page 7:

"The properties with which we are here concerned do not include any which were or are now being used in connection with the PUD's Box Canyon project. On the other hand, they are also indispensable to the construction of either of PUD's alternative projects in the event that a license or licenses are issued therefor." (Emphasis supplied.)

In the decision by the Court of Appeals for the District of Columbia Circuit (308 F. 2d 318), it was actually said by the court at page 323:

"The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project ..." (Emphasis supplied.)

On page 8 of its answering brief, Seattle erroneously describes the PUD's right, privilege, and authority originally granted under Washington Session Laws of

1907, Chapter 125, to perpetually back the water of the Pend Oreille River upon and overflow and inundate with said water certain shore lands on both sides of the Pend Oreille River as one which extends from "Lime Creek south to the tailwater of Box Canyon Dam, a distance of about 15 miles, or 2400 chains." The Z Canyon damsite is approximately 2 miles north and downstream from Lime Creek, and the aforementioned right extends from the Z Canyon damsite to the Box Canyon dam, which is a distance of approximately 17 miles. In the area upstream from the Z Canyon damsite to Lime Creek, PUD holds both the aforementioned rights granted under the 1907 Act and the fee title to the shore lands. The record shows that the rights under the 1907 Act, as they affect the area upstream from the Z Canyon damsite to Lime Creek, have consistently been recognized as existing separate and apart from the fee ownership of shore lands in this area. Even though there has been a common ownership, separate conveyances have been made. (Exs. P. 1, 4 and 6).

In considering the nature of the perpetual rights acquired under the 1907 Act, it must be remembered that they were specifically applied for and granted for use in connection with the erection and operation of a dam and water power plant. (Ex. P. 1.)

On page 9 of its answering brief, Seattle says, "The map reproduced by the PUD in its brief following

page 6 is inaccurate in that it represents that the PUD had some right or title to the bed of the Pend Oreille River." Seattle is inaccurate. In the first place, it disregards RCW 54.16.050, first enacted in 1931, which provides:

"Water rights . . . the district may erect, within or without its limits, dams or other works across any river or watercourse, or across or at the outlet of any lake, up to, and above high water mark; and, for the purpose of constructing or laying aqueducts or pipe lines, dams, or waterworks or other necessary structures in storing, retaining, and distributing water, or for any other purpose authorized hereunder, *the district may occupy and use the beds and shores up to the high water mark of any such lake, river, or watercourse.*" (Emphasis supplied.)

Furthermore, when the state, which owns the shore lands, as well as the bed of the river and the waters of the river, grants the right to perpetually back and hold the water upon and over the shore lands and to overflow and inundate the same, it is sheer nonsense to say that the grantee cannot also back and hold the water upon and over the bed of the stream. If such a grantee could not back and hold the water upon and over the bed of the stream, it would take a Jordan River miracle to give any meaning to the grant.

In reviewing the testimony of its witnesses as to value, Seattle seeks to avoid the impact of the district court's specific finding that the valuation expressed by those witnesses included no power site value.

“The testimony of power site value as expressed by witnesses for the defendant having been stricken, the only evidence in the record as to value is that testified to by witnesses for the plaintiff which includes no power site value.” (R. 94.)

Seattle says that its witness, Butler, gave full consideration to the adaptability of the property for reservoir purposes and then concluded there was no difference in valuation whether he included or disregarded “the adaptability of the properties for reservoir purposes.” It is significant that the reference is to reservoir purposes and not to damsite purposes. During the trial counsel for Seattle made this same contention that its witnesses in their appraisal had considered the adaptability of the property for power site purposes. That contention was then rejected as follows:

“THE COURT: I can’t go along with that, counsel, I don’t think your witnesses did. Quite to the contrary, I think.

“MR. WHITE: Well, I think that they testified that they did consider the power site. I think I can cite you the record on that, on both of them, but —

“THE COURT: You mean they considered it, but rejected it?

“MR. WHITE: Yes, that is right.

“THE COURT: Is that considering it?

“MR. WHITE: I think so, I think you have to consider it in order to reject it. If you don’t consider it at all, that is something different.

“THE COURT: No, it is still a rejection, I would say.” (R. Tr. 383.)

At the time the Findings of Fact were presented to the court for settlement, the district court specifically rejected Seattle’s contention that there is no measurable difference between the values of defendant’s properties and rights whether or not consideration is given to their adaptability for power site purposes. Seattle’s proposed Finding No. XIX. was to this effect (R. 65). In rejecting this proposed Finding, the district court said:

“THE COURT: It just seems to me that No. 19 could very well come out of plaintiff’s requests.

“In other words, I don’t desire the finding, I desire that there be no finding that there is no difference between values.

“Certainly I don’t think anybody would want to buy this rock bluff at Z Canyon for pasture purposes or reforestation, *but it certainly has some value as a power site.*” (R. PCF 20, Emphasis supplied.)

At this same hearing, held after the trial had been completed, the following colloquies took place:

“THE COURT: Do you know of any place in the Northwest where there are two power sites this close together as these two are? And as good as these two?

“MR. WHITE: As close together and as good?

“THE COURT: Yes.

“MR. WHITE: Well, I don’t know. I suppose there are, but I can’t think of any offhand.”
(R. PCF 17.)

“MR. DILL: I am very much confused by the Court’s remarks this morning, that neither of these findings reflected the view or the presentation of value that the Court had in mind.

“THE COURT: I didn’t say ‘presentation of value.’ I may have a different idea as to what the value is, and what I said, as I recall it, is *that I have a different idea of what the value is than the testimony of either the plaintiff or the defendant.*

“MR. DILL: Is that as a juror?

“THE COURT: Yes. No, I can’t do it as a juror, on anything but the evidence, and *I haven’t heard any evidence that reflects what I think the value of this property is.*

“MR. DILL: May I suggest that as a juror your Honor would be bound by what the evidence showed.

“THE COURT: That is true. I am bound by it. I can’t go out, as Mr. White refers to it, into the wild blue yonder, and dig up some evidence of my own.

“MR. DILL: Well, I don’t want to go into the other arguments. I was just curious, and somewhat confused.

“THE COURT: Well, perhaps I am, too.”
(R. PCF 47, emphasis supplied.)

Seattle's resume of the testimony of its witnesses on value, the colloquies quoted above, and the Findings of Fact finally entered by the district court point up the untenable posture of this case. It will be remembered that, pursuant to agreement at the time the case was called for trial, Seattle, as condemnor, put in its case first. During this stage of the proceedings, the testimony of Seattle's witnesses, who valued the PUD properties as reforestation lands and without any consideration of power site value, was admissible in support of Seattle's theory of the case that the action did not involve a power site. The Findings of Fact ultimately entered by the court show that PUD, in its case, established the following:

1. That it owned and held the private properties and rights constituting the principal and indispensable essentials for unique and excellent damsites, one of which had been partially developed;

2. That, except for a few scattered small tracts and a relatively few acres of federal lands that had been specifically set aside for power site purposes, it owned the properties and rights necessary for a power project; and

3. That beyond question the highest and best use of its properties being condemned was for hydroelectric power purposes.

The establishment of the foregoing by the PUD in its case rendered of no probative value the testimony

of value as expressed by Seattle's witnesses during its opening case. They had appraised reforestation lands, and it had thereafter been established that the action in fact dealt with a magnificent work of nature ideally designed for the production of electric power and for which there could be no "going market" as such properties are seldom exchanged. (See photographs Exs. D. 113 and 114.)

In determining "just compensation" it is well established that the availability of the subject of the condemnation for a special purpose or use must be considered as an element of value. 18 Am. Jur., Eminent Domain, Sec. 247, p. 885. In *Boom Co. v. Patterson*, 98 U. S. 403, 407-408, the United States supreme court said:

"... In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, *or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.*"

(Emphasis supplied.)

PUD's application to the FPC was denied because that Commission believed PUD did not then have a market for the power and could not finance a project whereas Seattle, in the Commission's opinion, needed the power and could finance the project (Ex. P. 9).

Whatever may be the special use, that use is to be considered in fixing "just compensation." Such special use, of course, must not be so speculative and remote as to impart no value. In the case at bar, there has been such long historical recognition that the properties in question are chiefly valuable for dam sites and power project purposes that their value and use for such purposes cannot, by any stretch of the imagination, be labeled as "remote" and "speculative." As early as 1910 the government set aside the adjacent federal lands for power site purposes. Colonel Cooper commenced putting the properties and rights together before 1915. The State of Washington granted perpetual rights for power project purposes in 1915. Seattle is acquiring the properties and rights for this very use.

In its rebuttal, Seattle offered no further testimony of value.

The district court having struck from the record the conclusions of value expressed by PUD's witnesses who had appraised the property in the light of its highest and best use, the record was bereft of any expert valuation opinions upon which the district court could make

an award of "just compensation." The district court admitted this was the situation at the time the Findings of Fact were settled. When Finding No. XX (R. 94) was being discussed, the following took place:

"MR. WHITE: Your Honor, counsel is inviting your Honor to just go off into the wild blue yonder in speculation, whereas I believe this is the testimony in the record.

"THE COURT: That would be true, Mr. White, if I stated in there what I thought the value was, *because there is no evidence to support what I think the value is*, and I think I am bound by the testimony in the case.

"MR. WHITE: That is all I am asking. That is the testimony.

"THE COURT: That is all the defendant is asking, also, although he embellishes it somewhat by including my statement *that I don't think there has been testimony on values here.*" (R. PCF 46, emphasis supplied.)

In the face of these facts, the district court judge nevertheless did go off "into the wild blue yonder" and used the opinions of value expressed by Seattle's witnesses in its opening case which had been stripped of probative value by later proof introduced by PUD and made an award of \$16,000. In the Judgment and Decree (R. 96) this award is described as "just compensation."

Immediately following the entry of the Findings of Fact and Conclusions of Law and Judgment and De-

cree, the PUD moved for a new trial on the grounds, among others, that it was error to consider the valuation testimony of Seattle's witnesses who admittedly did not appraise what was being condemned. This motion was denied (R. 105).

Seattle, in its answer to PUD's Specification of Error No. 1, which is based upon the trial court's rejection of evidence concerning the cost and capacity of a dam and power house at the Boundary site, which is immediately downstream from the Z Canyon site, attempts to support the district court's conclusion that such evidence was rendered inadmissible under the "value to the taker" doctrine. This label doesn't fit the offered evidence, which was just as admissible as was the evidence with reference to the cost and capacity of a dam at the Z Canyon site which was received in the record. PUD owned the indispensable lands and rights which, together with adjoining federal lands already set aside for power site purposes, constituted, for all practical purposes, the lands and rights necessary for a hydroelectric project whether the dam and power house were placed at the Z Canyon site or at the nearby Boundary site. Seattle makes no attempt to explain away the following statement made by the supreme court in *Grand River Dam Authority v. Grand Hydro* at p. 372 of Vol. 335 of the U. S. Reports:

"The present large development of this site by the petitioner under a federal license is *convinc-*

ing proof of the value and availability of the land for that purpose.” (Emphasis supplied.)

At this particular point in its brief, Seattle seeks to further justify the striking of the evidence of cost and capacity of a dam project that could be built and is being built at the Boundary site by arguing that a developer of a project with the dam and power house at the Boundary site might not be able to acquire a few scattered tracts except by condemnation. This argument will be answered later in this brief.

In replying to Seattle's attempt to support the district court's rulings striking the conclusions of value as expressed by PUD's witnesses, it is important to note the strait jacket the district court put upon the PUD and its valuation witnesses. The court adhered to a literal definition of "market price" and took the view that there are three and only three methods of arriving at "fair market value," these being reproduction cost, less depreciation, capitalization of income, and comparable sales. At the outset the court said:

“THE COURT: I believe this is the first time that the PUD has indicated the measure it intended to use to establish its testimony of fair market value. I am still at a loss to know what the evidence may be.

“Now, I think that somewhere very soon there should be a discussion about this subject. I don't know exactly whether this particular testimony

will come within or whether it is outside of the three methods, the three approved methods, of appraisals of property.” (R. Tr. 493-494.)

The court, although urged to do so, refused to recognize the teaching of *Kimball Laundry Co. v. United States*, 338 U.S. 1; *United States v. Cors*, 337 U.S. 325; *United States v. 93,970 Acres*, 258 F. 2d. 17; *Phillips v. United States*, 243 F. 2d 1; and *Washington Water Power Co. v. United States*, 135 F. 2d 541.

Justice Frankfurter pointed out in the *Kimball Laundry* case that the concept of “market price” is at best only a guess, and that there were situations where none of the three so-called approved methods of appraisal could be used as a means of ascertaining just compensation. He said on page 6:

“When the property is of a kind seldom exchanged, it has no ‘market price’ and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights.”

Our attention has just recently been called to the unpublished opinion of federal district Judge W. J. Jameson wherein he determined \$4,500,000 was the just compensation due the Crow Tribe of Indians for the taking of the Yellowtail dam site on the Big Horn River in Montana. This opinion is very much in point and completely demonstrates the propriety and admissibility of PUD’s valuation testimony. For the convenience of this Court, Judge Jameson’s pretrial rul-

ling and unpublished opinion are included in the appendix to this brief. A review of the ruling and opinion are seriously urged. No appeal was taken from Judge Jameson's decision. Counsel in the case advise that the government accepted the decision as final and made payment accordingly.

A few comparisons with the Yellowtail project are revealing.

PUD's Proposed Project at Z Canyon:	Direct Construction Costs Exclusive of Site Costs	Capacity
High Z	\$62,100,000 (R. Tr. 682)	555,000 Kws. (R. Tr. 649)
Low Z	\$56,420,000 (R. Tr. 710)	345,00 Kws. (R. Tr. 712)
Yellowtail:		
Owner's witness, Jones	\$79,655,000 (App. p. 25)	
Government witness, Patterson	\$95,827,650 (App. p. 27)	250,000 Kws. (App. p. 38)

If a site that lends itself to the construction of a power plant with a capacity of 250,000 kilowatts at direct costs somewhere between \$80,000,000 and \$96,000,000 is worth \$4,500,000, a site such as the Z Canyon area which lends itself to the construction of a power plant with a capacity of 555,000 kilowatts at direct costs of approximately \$62,000,000 is worth a great deal more than \$4,500,000. As Judge Jameson says in the Yellowtail decision when referring to an increase in the capacity of the Yellowtail project,

“Obviously, the increase of capacity from 200,000 to 250,000 kilowatts with little, if any, additional cost would result in an increase in the value of the site.” (App. p. 39.)

In the case at bar the project has more than twice the capacity of the Yellowtail project, and construction costs are less.

Also, in considering the \$4,500,000 award in the Yellowtail case, it should be noted that in the definite plan report for the Yellowtail project prepared and filed by the United States Department of Interior, Bureau of Reclamation, and referred to by Judge Jameson, it was estimated that the Yellowtail project involved clearing costs and relocation costs of \$2,772,800.

The Crow tribal lands involved at the Yellowtail site constituted 5,677.94 acres out of a total project acreage of 30,857 acres. In addition to the tribal lands, the Yellowtail project required 10,778 acres of private land, 2,486 acres of state land, and 10,604 acres of federal land (App. p. 18, 19).

PUD's proposed High Z project with a 200 foot buffer zone would require 2,547.2 acres. In addition to PUD's lands and rights, this required only 143.2 acres of private lands, 2.6 acres of state land, and the use of 793.4 acres of federal lands. Without the 200 foot buffer zone, the High Z project required 2,198 acres and called for the acquisition of only 47 acres of private lands and the right to use only 543 acres of federal lands (R. 88, 89). The Low Z project, naturally, would require less private lands and the use of fewer acres of federal lands.

In the case at bar it is apparent that the district court's view of the conclusions of value expressed by PUD's witnesses was affected by the substantial sums expressed. Mr. Vaughan reached a conclusion of \$8,600,000 and Mr. Courtney \$7,498,000. This was indicated when the district court said:

“Certainly, I am inviting a much more nominal valuation of the property than has been placed on it, and perhaps the PUD doesn't want that, I don't know, but I will leave that observation with you.” (R. Tr. 1554)

Seattle, on page 39 of its answering brief, emphasizes this by referring to Mr. Vaughan's conclusions of value as “astronomical.”

In the Yellowtail case, Judge Jameson, after referring to Dr. Hershel F. Jones, economist, and J. A. Krug, former Secretary of the Interior, as “well qualified expert witnesses,” said,

“Jones and Krug expressed the opinion that the lands acquired were worth at least \$12,500,000. Using 9 different methods or variations of methods, they arrive at figures ranging from \$10,300,000 to \$26,650,000.” (App. p. 23.)

This indicates that the conclusions of value of the Z Canyon site expressed by Mr. Vaughan and Mr. Courtney were indeed modest.

As Judge Jameson points out in his decision, the Solicitor of the Interior Department, when testifying

before the Senate Committee on Interior and Insular Affairs with reference to the Yellowtail project, said:

“ . . . It is a very profound question and, to these Crow Indians, a very vital legal question, as to whether or not this power site feature is a compensable item. *If it is, they get a lot of money; in anybody's language they get a lot of money.*” (App. p. 37. Emphasis supplied.)

It is pointed out in PUD's opening brief that study was given to the appraisal methods used in the *Twin City* cases. (*United States v. 1532.63 Acres et al.*, 86 F. Supp. 467 (1949); *United States v. 3928.09 Acres et al.*, 12 F.R.D. 127 (1951); *United States v. 3928.09 Acres of Land et al.*, 114 F. Supp. 719 (1953); *United States v. Twin City Power Co. et al.*, 215 F. 2d 592 (CCA 4th Cir., 1954); *United States v. Twin City Power Co. of Georgia*, 221 F. 2d 299 (CCA 5th Cir., 1955); *United States v. Twin City Power Co.*, 350 U. S. 222, 100 L. Ed. 240, 76 Sup. Ct. 259 (1956).) PUD in its endeavor to follow the pattern approved in *Twin City* even retained Mr. Courtney, the distinguished hydro-electric engineer who had testified in those cases. On pages 59 and 60 of its answering brief, Seattle seeks to discredit the appraisal methods used in the *Twin City* cases because the lower court's rulings allowing power site value were reserved by the supreme court on the basis of the doctrine of dominant servitude. Judge Jameson pointed out that this reversal did not rule against the propriety of the manner in which the ex-

pert witnesses arrived at their opinions of value. In his pretrial memorandum (App. p. 6) he said:

“Various approaches were considered by the expert witnesses in the *Twin City* cases (see 86 F. Supp. 467; 114 F. Supp. 719, affirmed 215 F. 2d 592; 221 F. 2d 299). While the Supreme Court held that dam site value could not be allowed, the approaches of the various appraisers in these cases may be of some assistance in the event this court is correct in its conclusion that water power or dam site value may be allowed in the instant case. I have obtained the transcripts on appeal in those cases and will have them available for the use of counsel if desired.”

Seattle's Attack on PUD's Valuation Witnesses

Seattle would apparently support the district court's ruling striking the value opinion of PUD's witness, Vaughan, principally on the grounds that it was based on what a dam builder *could* pay for the property rather than what a willing buyer *would* pay. This analysis stems from a complete misunderstanding of the testimony of the witness.

Vaughan's opinion as to the value of the PUD properties amounted in essence to a judgment figure of what he concluded a willing buyer would pay a willing seller on the open market. This was arrived at after a careful study of all factors, both general and particular, that he believed would be considered by such buyer and seller. (App. to PUD's opening brief, pp. 12 and 24.) His opinion was influenced by several

studies he had made of neighboring hydroelectric projects of recent development and similar magnitude. In these studies he had compared from various viewpoints the neighboring projects with the type of project to which the Z Canyon site is adapted, believing that such studies would have their place on the bargaining table of prospective buyers and sellers.

These studies allowed the witness to analyze such items as the amounts that recent enterprisers in the hydroelectric field had been willing to invest in the production of given units of energy, the amounts that such enterprisers had been willing to invest in land and land rights in the development of such projects, and the cost per unit of energy produced at the neighboring projects.

It must be appreciated that modern hydroelectric projects are not in the nature of ordinary commercial manufacturing plants. They are all substantially similar in design. Their output is a constant factor primarily dependent only on the flow of the river which they harness and not on the skills or ingenuity of their operators and management. They are competitive with each other only in the sense that the total construction cost of each project determines basically the cost of each unit of energy produced therefrom. The energy thus produced does not vary in size, color, or weight whether it be produced from one plant or another.

Admittedly the comparisons made by the witness reflected to him an indication of the value of the land

and land rights of the PUD taken as a whole. However, none of these studies were offered by the witness as a direct measure of value. Some of them were used as background information for his initial estimate of value of the PUD properties and others were used as checks on the reasonableness and accuracy of that estimate. For that matter, the result of those computations was never expressed in the form of a monetary figure by the witness until it was elicited by Seattle's counsel on cross examination. It proved to be \$34,000,000, nearly 4 times the estimate of the witness of the value of the properties in their present state (App. to PUD's opening brief, p. 49).

Mr. Vaughan recognized, that this figure was not representative of the fair market value of the PUD properties. This is demonstrated by his testimony on direct examination:

“Obviously, that could not be used directly as a measure of value of the land in the present condition, anybody buying it in its present condition would be buying it for the purpose of creating this value. Obviously, he would not pay that amount for it . . .

“It may take considerably longer than four years, so I have applied a discount factor to reduce that value from the indicated value subsequent to completion, to get an indication of the justified value of the rights in their present condition.” (App. to PUD's opening brief, p. 20.)

and again on cross-examination:

“As my work sheets will show on the comparison I made, the cost of land and land rights is roughly 1 cent per kilowatt hour. In valuing these, I have reduced that to 25 mills, or $\frac{1}{4}$ of that amount, because, as I have stated, the direct comparison taken from the FPC reports result in a justified or comparative evaluation, assuming all clearing had been done, all relocation had been done, the project had been erected at the estimated cost, then the comparative cost would be in the neighborhood of \$34,000,000 which I have reduced to my figure of \$8,700,000 to make allowance for these factors you have just been asking me about.” (App. to PUD’s opening brief, p. 49)

This “discount” figure, as it was called by the witness, Vaughan, or “judgment factor,” as it was later called by his companion value witness, Mr. Courtney, (R. Tr. 1391) is the ultimate appraisal — it is the opinion of the witness of the fair market value drawn from the totality of his experience and knowledge as an expert in the field. It is not a direct mathematical computation. From the very nature of the property valued, it cannot be. This is a trueism which Seattle’s counsel refuse to accept. They insist on seeking out a direct measure of value — a “yardstick” by which the value of the property can be measured with scientific accuracy, and in their zeal to find such yardstick, they have erroneously seized upon one of the background studies made by the witness and have attempted to apply it as a direct measure of the value of the properties — something which the witnesses themselves declined to do. If the value of such properties could

be measured with the scientific accuracy demanded by Seattle's counsel, there would be little need for expert witnesses.

Seattle has not cited a single case wherein the approach used by PUD's witnesses was rejected in the valuation of a dam site, particularly a partially-developed dam site which is herein condemned. On this issue, Seattle appears to rely entirely upon *Fairfield Gardens, Inc. v. United States*, 306 F. 2d 167, (Seattle's answering brief, p. 30) a Wherry housing project case wherein the court rejected sales of other housing projects in divergent sections of the country to establish a direct measure of the value of the project there in question, holding that such sales were not comparable. The capitalization of income approach, which is universally accepted in such cases, was readily available and was utilized and accepted by the court as the proper alternative. (It should be noted that the PUD, in desperation, also proffered the capitalization of income approach, which was rejected by the court upon objection of Seattle (R. Tr. 1627)).

The distinction is simply that the courts require the best type of evidence available be offered to assist the court in its effort to establish just compensation. In the case of a dam site such as that with which we are confronted, there is no recognized competent evidence available other than the informed estimate of those who are particularly versed in the field.

Certainly such an expert should not be disqualified because he has knowledge of facts which would not be admissible as direct evidence of the value of the property taken. To what extent the witness should be permitted to elaborate on those facts is another and less important issue. The PUD submits that the more well-seasoned cases would permit such expert to explain his opinion by freely expressing the elements that have influenced him heavily in formulating that opinion, particularly so as in the instant case where the trial is before the court without a jury. This enables the court to more fully appreciate the foundation upon which the opinion is based and to rely on it or discredit it accordingly. If the court finds that the witness has been influenced by unacceptable assumptions or data, the court may make the necessary adjustments in weighing the opinion, but such matters must necessarily in such cases go to the weight of the testimony, not to the admissibility. Otherwise, the condemnor need only cross examine until the witness admits that he has considered some fact or element that would not in itself be probative evidence (quite a simple matter), move to strike the opinion, and thus prevent any chance of the landowner receiving just compensation for the property.

The reasonableness of the above argument is aptly demonstrated by the character of Seattle's other grounds in support of its attack on PUD's Specification of Error No. 2. For example, Seattle complains that the witness, Vaughan, by consulting with another member of his appraisal firm who specialized in the

appraisal of mining property, in an effort to familiarize himself with the nature and value of a few small mining claims within the reservoir area “... was basing his opinion on facts and opinions not in evidence, a practice held improper by this court in *Standard Oil Co. v. Moore*, 251 F. 2d 188, 221 (1957).”

It is submitted that Seattle has erroneously reported the holding of the court in the cited case wherein this court in fact held:

“Appellants also contend that the hypothetical question, as asked, omitted the recital of many fundamental facts which were in evidence, and assumed basic facts contrary to the uncontradicted record.

“... ”

“In general, it may be said that a hypothetical question should include any undisputed fact which is clearly material and important. The parties, however, are often not in agreement as to what facts are undisputed, material, and important. If it is objected that certain facts should be included, it is for the trial judge, in the exercise of his discretion, to determine whether the question should be reframed to add such facts. *Pasadena Research Laboratories v. United States*, 9 Cir., 169 F. 2d 375, 384, certiorari denied, 335 U.S. 853, 69 S.Ct. 83, 93 L. Ed. 401. (p. 220)

“... ”

“Opinion Testimony Based on Facts Not in Evidence. We have discussed above the contention that the hypothetical question asked of Dr. Burd was defective, in that it assumed facts not in evidence. Appellants also argue, quite apart from the

asserted improper form of the hypothetical question, that Dr. Burd should not have been permitted to premise his answer upon facts which were not in evidence, and many of which were based on hearsay.

“Dr. Burd testified that, in preparing himself to express an opinion as to market value, he made certain studies and gathered background information from a number of sources. He indicated the nature of these studies and the sources drawn upon. The information gained or findings arrived at in the course of this research were not revealed, however, nor were the source materials which Dr. Burd consulted offered in evidence. On at least one occasion, counsel for Moore sought to have Dr. Burd testify as to the information gained in these pretrial studies. Appellants’ objection was sustained, the court instructing the witness: ‘You can state if you consider things as a reason for this, but you cannot say what the things are as a factual basis.’

“It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert’s sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed.” (pages 221, 222)

It is interesting to note that special counsel representing Seattle in the case at bar are members of a law firm which represented the appellant Standard Oil Co., in the cited case.

The reasoning of the above case is applicable to the objections of Seattle to the testimony of the witness, Vaughan. Seattle objects that an unidentified person wrote a Federal Power Commission publication to which the witness had referred for study and investigation and that the witness did not know the basis upon which that author allocated certain costs to power, storage, and other uses. It objects that the witness " . . . was hazy as to just what the relevant FPC account included . . ." and that the publication studied by the witness may have included some condemnation costs, court costs, and counsel fees under a subtitle of "Land and Land Rights." These were all matter which went properly to the weight of the opinion given by the witness, not to its competency.

In the *Twin City* cases the appraisal witness, Johnson, used the same approach as did Mr. Vaughan. It is shown on Johnson's Exhibit 40 (App. to PUD's opening brief p. 151) that he made use of the same FPC records as were used by Mr. Vaughan. The courts in the *Twin City* litigation found nothing wrong with this.

The fact is that the above objections formed no part of the trial court's basis for striking the value opin-

ions of the PUD's witnesses. Although the objections of Seattle's counsel were repeatedly directed toward various of those issues, the remarks of the Court gave no indication that it was in those areas that the court found the witnesses' testimony to be objectionable. Had an objection been sustained at the time of trial on any of the bases contended by Seattle, the PUD would at least have had an opportunity to correct the form of its evidence. On the contrary, however, the basis of the trial court's ruling seems best summed up in the court's ruling on the PUD's Motion to Reconsider wherein the Court said:

"I thought that the valuation placed on the properties by the valuation witnesses presented by the PUD were not on a fundamentally correct basis. I felt that the only basis upon which the property could be valued was on the basis of comparables or opinion evidence based upon some comparable properties." (R. MTR)

It can be seen that the district court adhered to the proposition earlier announced that valuation witnesses are narrowly restricted to the three approaches, reproduction costs, capitalization of income, or comparable sales, and that the only pigeon hole available to PUD was the comparable sales approach regardless of the unique character of the property and the testimony of the PUD's value witnesses to the effect that they were unaware of any comparable sales (R. Tr. 1038 and 1339).

To support its contention that Mr. Vaughan appraised the properties as though the PUD had already acquired all necessary licenses and permits to construct its proposed project, Seattle quotes from context on cross-examination:

“ ‘I have appraised this as a right to build an existing hydroelectric dam as planned . . . ’ (RTR 1131-1132) ” (Seattle’s brief, p. 33).

In fact, the testimony continues:

“I have appraised this as a right to build an existing hydroelectric dam as planned, and if now you are talking about an completely different location, I would have to consider the completely different location.

“Q. Have you appraised it as a right to build or have you appraised the land on which to build ?

“A. The land on which to build which conveys the right to build.

“G. Does the mere ownership of the land on which to build convey the right to build, in your thinking, Mr. Vaughan?

“A. Not without approval of the Federal Power Commission and public agencies, of course.”

It is abundantly clear from a reading of the entire testimony that the witness recognized the absence of a Federal Power Commission license. This is quite obviously one of the reasons why he valued the properties at \$8,700,000 rather than at the above-quoted \$34,000,000 figure. In the opinion of the witness, how-

ever, such deficiency would not prevent the properties from maintaining a substantial value for power site purposes. As he explained:

“They owned the land upon which the dam would be built, the adjacent — they had the flow rights, the overflow rights, sufficient to cover the reservoir, to private lands and adjoining the federal land which would permit the rest of it, there was a need for the dam in that location.

“There is no inherent right for anybody to build a dam; you have to get permits from the federal agencies; but I think it is reasonable to assume that if anyone owned these rights under these circumstances, when there was a need for additional power, that the regulatory bodies would not be capricious or would not refuse to grant the permit to a bona fide owner who was capable of utilizing the property.” (R. Tr. 1143.)

This is a realistic viewpoint accepted by at least one court as stated in *Metropolitan Water District v. Adams*, 116 P. 2d 7, 21:

“The fact that the realization of any of the water importation projects outlined by the engineers would depend upon the solution of problems which might arise in connection with the acquisition of water rights, lands, rights of way, easements, state or federal franchises, or other interests essential to consummation of the plans, did not render testimony too remote or speculative to merit consideration by the jury. Such uncertainties and difficulties are only those which confront every prospective purchaser of a site for terminal storage. They are commonly met and conquered in every present day large scale water project. If it were necessary to eliminate them before per-

mitting the expression of an opinion of market value of a terminal storage site, it is safe to say that no value based upon adaptability of the land to that use could ever be reliably established. Given a sufficiently urgent public demand for additional water, an available supply for importation, and an economical and feasible plan for its transportation, there is certain to be forthcoming the necessary capital to finance the undertaking upon suitable terms, with all essential governmental sanctions, and power in the public agency managing the development to procure, by condemnation or otherwise, all necessary lands, easements, water rights, or rights of way. In short, the ordinary problems inherent in the development of property for terminal storage affect only the weight and not the admissibility of evidence attesting the potential demand for and adaptability of the site to such use under economically feasible conditions, and other proper elements of evaluation. *McCandless v. U.S.*, 56 S. Ct. 764, 80 L. Ed. 1205."

Seattle's contention that the witness considered the use of federal lands as part of PUD's property for valuation purposes is dispelled by a reading of the above-quoted testimony. The witness did not value the federal lands as PUD property. He valued the PUD lands in their realistic state — enhanced by their abutment upon federal lands that had been set aside by the Secretary of Interior for use in conjunction with hydroelectric power projects. The propriety of such consideration by the witness is demonstrated by *U. S. v. Jaramillo*, 190 F. 2d 300, (10th Cir. 1951), wherein the federal government was itself condemning ranch lands that were adjoined by federal lands upon which public grazing of cattle had been permitted. The court states on page 302:

“In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. . . .

“Like schools, roads, markets, water and other appurtenant elements of value, it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken, . . .”

In attempting to support the district court’s ruling striking the conclusion of value expressed by PUD’s witness, Courtney, Seattle, on pages 41 to 51 of its answering brief, discusses numerous matters, some of which might properly be considered in evaluating the weight to be given to Mr. Courtney’s testimony. Here again, Seattle failed to discuss the grounds stated by the court as the basis for the ruling. In this ruling the court again stated its view that the only means of proving value in the case at bar was the comparable sale approach. In striking Mr. Courtney’s conclusion of value, the court said :

“I think that this testimony is not fundamentally sound, counsel, on the matter of value. It isn’t a comparable sale approach, it isn’t a capitalization approach, which you said was not to be used, or Mr. Ennis did. Of course, it can’t be a reproduction cost approach.

“I think there has to be some basis upon which an amount is determined, and to place it on the basis of taking a piece of raw land and theoreticallay selling the power becomes a pyramiding on nothing, on the raw land, and there is no plant there. I think this is testimony that cannot be used, as I view it, recognizing the tremendous qualifications of this man.” (R. Tr. 1495-96.)

The district court was heedless of the admonition of the United States supreme court not “to make a fetish even of market value, since that may not be the best measure of value in some cases,” (*United States v. Cors*, 337 U.S. 325-332) and PUD was thereby placed in an untenable position. It admittedly owned a power site of great value but could not prove it because other similar sites had not been bought and sold in the market.

Seattle criticizes Mr. Courtney because he considered that the developer of a power site owning the properties and rights of the PUD in the Z Canyon area of the river would run the water of the river through penstocks or intake structures in order to generate power. As a basis for the criticism, Seattle asserts on page 48 of its answering brief that PUD had no riparian rights because, in the State of Washington under the decision of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539, riparian rights do not exist in navigable waters. Seattle incorrectly applies the *Eisenbach* decision. In that case the riparian owner owned only the uplands and the state still owned the shore lands between the boundary of the uplands and the navigable

waters proper. In the case at bar, PUD had fee title to both the uplands and the shore lands. Its predecessor in interest had acquired title to the shore lands in 1916 (Ex. P. 3) prior to the enactment in 1917 of a code in the State of Washington establishing appropriation rights and procedures. This code preserved existing rights (RCW 90.03.010).

Having acquired title to the shore lands, PUD became the owner of the riparian rights attached thereto. *Northern Pacific Railroad Company v. Slade Lumber Co.*, 61 Wash. 195, concerns a case where the owner of uplands acquired from the State of Washington the title to the adjoining tidelands. The Court pointed out that the acquisition from the State of the tidelands, which are equivalent to the shore lands in the case at bar, distinguished the case from *Eisenbach v. Hatfield*, 2 Wash. 236, *supra*, which had been cited in support of the proposition that the upland owner on navigable water had no riparian rights. The Court said on page 199:

“In the absence of facts and conditions upon which the *Eisenbach* case was predicated, its doctrine ceases to be applicable, and on the facts now before us, respondent should be held to have a right of access to its wharf located on its own land and contiguous to the deep water, *and that the same is valuable property right*. In *Muir v. Johnson*, *supra*, we said:

“ ‘As early as the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L.R.A. 632, this court held that the owner of uplands bordering on navigable

able waters as such had no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith. This holding was based on the ground that between the boundary of the upland and the navigable waters proper there were *shore lands* which belonged to the state *and to which* all riparian and littoral rights attached, and the state, *or its grantee after it conveyed the lands*, had the sole right to complain of obstructions placed between the lands and the navigable waters of the river, lake or other body of water upon which they bordered.'

"If the grantee of the state has the right to complain of such obstructions, it is apparent that the respondent, being such a grantee, has the right to complain in this action." (Emphasis supplied.)

Further authority that the owner of shore lands possesses the riparian rights is found in *Bilger v. State*, 63 Wash. 457, wherein the Court said at page 465:

"It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington were acquired by them by virtue of the purchase of the shore lands made by them from the State of Washington."

See also *State v. Sturtevant*, 76 Wash. 158, wherein the Court said at page 164:

"That littoral and riparian rights attached to shore lands is recognized in *Bilger v. State* . . ."

On page 49 of its answering brief, Seattle cites CXLII. of the Session Laws of 1891 (p. 327) to support its statement that the PUD incorrectly stated on

page 53 of its opening brief:

“that before enactment in 1917 of a code in Washington establishing appropriation rights and procedures, no appropriation was necessary to establish a right to build a dam on the Pend Oreille River.”

On page 53 of its opening brief, PUD was commenting on the order creating perpetual rights issued in 1915 under Chapter 125 of the 1907 Session Laws and said:

“This perpetual right was created prior to the adoption in 1917 of a code in the State of Washington establishing appropriation rights and procedures, and no other state grants were then necessary in connection with the erection and operation of a dam in the Pend Oreille River and the use of the waters thereof for water power purposes.”

The 1891 law referred to by Seattle was specifically limited to the use of water for irrigation, mining, and manufacturing purposes. The later 1907 act specifically referred to “the erection, construction, maintenance or operation of water power plants, reservoirs, or works for impounding water for power purposes . . . ”

In any event, Seattle’s aforementioned complaint against Mr. Courtney’s assumption that PUD or its purchaser would have the right to divert the water of the river through penstocks or intake structures is fully answered by the decision in *Metropolitan Water District v. Adams*, 116 P. 2d 7, quoted at pages 30-31, *supra*.

In addition to what it had to say about the methods used by PUD's witnesses in arriving at a value for power site purposes, Seattle says that in any event the subject is moot inasmuch as "PUD's case for power site value failed because of its failure to show reasonable probability of devoting property to reservoir use." (Seattle's answering brief, p. 57.) Seattle predicates this contention on Finding of Fact No. 11 (R. 88) that as to the Boundary project or High Z project a prospective developer "could probably not acquire" a few acres of privately owned land in the reservoir area "by voluntary transfer if it be assumed that such developer did not have the power of eminent domain." As to the Low Z project, this finding provides that a developer "could acquire the necessary properties by voluntary transfer even if it be assumed that such developer did not have the power of eminent domain."

As to the Boundary and High Z projects, it is Seattle's position that the finding that a developer might not be able to get deeds to this minor amount of private property in the reservoir area without threatening condemnation is tantamount to a finding that there was no reasonable probability that such a developer could utilize the Boundary site for a power plant or the Z Canyon site for a high dam power plant. It is submitted that the Finding of Fact as actually stated does not necessarily negate the reasonable probability aforementioned. Furthermore, it is important to note that the district court specifically did not from this

Finding of Fact conclude as a matter of law that the useability of the property for either a Boundary project or a High Z project could not be considered in arriving at just compensation. Of course, the finding in no way affects consideration of the use of the property for the Low Z project. In this connection, it is also interesting to note that Judge Jameson, in the Yellow-tail case, made a substantial award based upon the use of the land for power site purposes even though he also found that:

“The plaintiff has failed to show that as of July 15, 1958, or today, there was any reasonable prospect of the plaintiff tribe developing a single purpose power project, or that any private utility was interested in doing so.” (App. p. 68.)

Seattle uses the reference to the possible inability to acquire a few tracts in the reservoir area for either a Boundary or High Z project voluntarily without threat of condemnation in an attempt to bring the case at bar within the rationale of *McGovern v. New York*, 229 U.S. 363; *New York v. Sage*, 239 U.S. 57; and *United States v. Powelson*, 319 U.S. 266. The cited cases, without exception, dealt with situations where a condemnee who owned but a small portion of the properties necessary for the construction of a hydroelectric or similar project was seeking to recover power site value or its equivalent, usually on the theory that such condemnee possessed a state-granted right of eminent domain and could have condemned all necessary remaining lands.

In *McGovern v. New York*, 229 U.S. 363, *supra*, the condemnee owned what was described merely as “part” of lands that were being condemned by the City of New York for use as a water reservoir. The different parcels of land were in “hundreds of titles” and there was apparently no showing that the condemnee possessed the power of eminent domain or, for that matter, that anyone except the city would have use for such reservoir. The court said at p. 372:

“The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation.”

New York v. Sage, 239 U.S. 57, *supra*, involved another condemnee owning properties in the same reservoir area under similar conditions.

In *United States v. Powelson*, 319 U.S. 266, the court was concerned with a four-dam hydroelectric project. Again there were several hundred tracts needed in addition to the lands owned by the condemnee. Although one of the proposed dams was to be located on the lands of the condemnee, that dam in itself was not contended to be profitable for power development. The condemnee relied on a state-granted right of eminent

domain to support his contention that the value of his property should be measured by the profit he would have realized if he had completed the project. The court stated at p. 285:

“We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken . . . ”

The various court of appeals cases cited by Seattle which interpret the *Powelson* case are all cases wherein the condemnee owned such an insignificant portion of the properties necessary to complete a feasible project that any evidence founded on a consideration of the contemplated project was a matter of pure speculation. The reasonable interpretation of those cases is that the condemnee's power of eminent domain cannot be relied upon to transform a speculative pipe dream into something such as the PUD owned and held in this case.

At the Z Canyon site the proposed dam, power house, and switch yard were all located upon lands and rights owned and held by PUD except that the east abutment of the dam, to the limited extent that it would rise above the shore lands, would rest upon federal lands that had been set aside for power site purposes (Exs. D. 113, 114, 130a, 130b, 137, and 142; Exs. P. 80a and 80b.)

In the Yellowtail decision, Judge Jameson said:

“As an additional reason why power site value should not be considered, the Government argues that the plaintiff does not own a sufficient portion of the site to accommodate the location of a power project. It is undisputed, however, that the dam, powerhouse and switchyard are all located on the lands acquired from plaintiff . . .

“ . . . A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, presumably would be willing to pay dam site or water power value to the Crows for a dam impounding water over the entire area, less the cost of necessary acquisitions of non-Crow lands at their fair market value, which would not include water power value.” (App. p. 57-59.)

Because of this essential ownership of the site, the necessity to acquire 10,778 acres of private lands and 2,486 acres of state lands in order to complete the project did not deter Judge Jameson from making a substantial award of just compensation for the taking of the power site.

Possible difficulties in acquiring additional lands necessary for completion of a project, even by condemnation if necessary, did not defeat the owner's right to just compensation in *McCandless v. United States*, 74 F. 2d 596 (9th Cir. 1935). In that case, the government was condemning a cattle ranch in Hawaii. Although the tracts of land being taken were non-irrigable in themselves, the condemnee also owned other tracts several miles distant upon which he had intended to construct an irrigation project which would permit him to pipe water to the tracts taken. The district court had excluded evidence on the cost of transporting

water to the land. In reversing that ruling, this court said at p. 601:

“It appears from the evidence that in order to supply the land in question with a sufficient water supply for the cultivation of sugar cane the water would have to be conducted not only across public lands of the Territory but also across other land held in private ownership. It may be assumed that such a right of way may be acquired over private lands by condemnation if necessary by means of a corporation organized for such a purpose. 48 USCA Sec. 562; Rev. Laws Hawaii 1925, Secs. 828, 829.”

Although the above case was not appealed squarely on that issue, it was necessary for the United States supreme court to pass upon that issue in reviewing the case. In that regard the court said:

“That the greater part of the land here sought to be condemned was adapted to the successful growth of sugar cane if provided with sufficient water for irrigation is not controverted. Proof that a supply of water was available and might be brought to the land at an expense consistent with its profitable use was, therefore, relevant and material. And this the evidence offered tended to establish. The ruling of the trial court rejecting the offers, and its instruction to the jury to disregard the possibility of bringing water from lands other than the land sought to be condemned and the 284-acre tract adjoining, were erroneous. This is well pointed out by the court below, and we see no occasion to enlarge upon its opinion.” (*McCandless v. United States*, 298 U.S. 342, at p. 345-346.)

That this distinction was recognized by the United States supreme court when it decided the *Powelson*

case is clear from the fact that the court cited *McCandless v. United States*, supra, with approval at p. 275, the beginning of its legal treatise on the issue.

SEVERANCE

Seattle attempts to dodge the severance issue. To meet the PUD's contention that the court erred in the pretrial order forbidding the PUD even to present evidence to show whether the court should award severance damages, it tries to divert attention to facts and agreements that have no relation to PUD's claim for severance damage.

First, it attempted to cloud the issue by relating the claim of severance damage to the uplands at the Z Canyon site remaining after the taking of the balance of said uplands. The record is completely clear that the severance claim was not related to the remaining uplands at the Z Canyon site.

Second, Seattle further attempts to confuse the issue by relating the claim for severance damage to PUD's claim that the taking sought by Seattle included a partial taking of its Box Canyon project which would result from the raising of the water in the tailrace of the Box Canyon dam as a result of the impoundment of water by the Boundary dam. This claim was set out as a part of PUD's contention No. III. in the pretrial order (R. 44). After seeking to so identify the severance claim, Seattle

then calls attention to the post-trial agreement by the terms of which the parties settled this matter of encroachment on the Box Canyon project by the Boundary reservoir.

It is perfectly clear that the PUD's claim of severance damage was not related to the foregoing claim that was settled. PUD's claim of severance damage was separately stated as a distinct claim in its contention No. IV. set out in the pretrial order (R. 45).

The balance of Seattle's brief on the subject of severance is based on the argument that the license gives Seattle the right to build the Boundary dam, and that since the PUD now can't build a dam at Z Canyon, it has no right to severance damages (Seattle's answering brief pp. 53 to 57).

Seattle would have the court forget or entirely disregard the evidence of how Seattle induced the PUD to withhold filing a renewal of the Cooper application for a license to construct a power plant at Z Canyon. The Cooper application had been denied without prejudice (R. 34). Seattle induced the PUD to withhold its application while Seattle carried forward its investigation of the Boundary site under a preliminary permit for three years, preparatory to filing its application for that site. This dates back to October, 1953 (Exs. D. 119, 120; R. Tr. 337, 345, 346). A brief review of how Seattle brought this about become appropriate at this point.

In the letter of October 28, 1953, to the PUD, while the PUD was engaged in building Box Canyon dam on the Pend Oreille River, Seattle stated it had filed an application for a preliminary permit to study the Z Canyon-Boundary stretch of the Pend Oreille River (Ex. D. 119). At that time, the PUD had already secured its land and rights on both sides of the Pend Oreille River from the Boundary dam site upstream to the Box Canyon dam. As had been previously pointed out, these lands and rights constituted the essential and indispensable private lands and rights needed for a power dam at either the Boundary or Z Canyon sites. Additional necessary uplands had been withdrawn by the government for power site purposes.

When the Manager of Seattle City Light wrote the letter to the PUD requesting a conference to work out some agreement with reference to this stretch of the river, Seattle had no rights or ownership of any kind. Nevertheless, the PUD accepted the invitation, and representatives of the parties held their first meeting in Spokane, in February, 1954 (R. tr. 337).

When a series of conferences failed to reach any agreement, the PUD passed Resolution No. 328 (Ex. D. 122) dated June 11, 1954, directing its Manager to renew the application for the construction of the Z Canyon project. The PUD purchased the properties being condemned as an addition to its electric system so that, with a project at Z Canyon, it could firm

up production of power at Box Canyon during the flood season when the Box Canyon plant would be down (R. 35; R. Tr. 447.8).

Before filing the application, the PUD Manager, at a conference of the representatives of the parties in Seattle on August 24, 1954, explained the action of the PUD Commissioners and his intention to file the application (R. 465-6). Dr. Paul Raver, Superintendent of Seattle City Light, then called in a stenographer and dictated what was termed the Memorandum of Intent by which the parties declared their purpose to construct a power plant in the Z Canyon-Boundary stretch of the river as a joint venture on a 50-50 basis (R. Tr. 446-7; Ex. D. 123). As a result, the PUD withheld filing its application. It did so despite the fact that at that time the dam site at Z Canyon was partially developed. Cooper's engineers had sunk a 200 foot deep shaft beside the river at the bottom of the narrow deep canyon, tunneled underneath the river to the other side and diamond drilled holes upward into the rock in all directions. Thus the dam site's foundation had been proven to be solid rock. Plans for both a low dam and a high dam bringing the Cooper plans up to date were ready to be filed. All that was needed was to renew the application for a power plant to be operated in coordination with the Box Canyon project. Nevertheless, the PUD withheld action. Why? In order to permit Seattle to secure its Preliminary Permit, the grant of

which had not yet been announced, and investigate the Bounadry site as a possible alternate site to be built upon by the parties jointly.

In pursuance of the plans and purposes set out in the declarations of the Memorandum of Intent, the parties negotiated a 50 year contract in 1956 by the terms of which Seattle purchases power produced by PUD at its Box Canyon project. When the City Council of Seattle officially ratified that contract, which in its preamble clauses recognized PUD's ownership on the Pend Oreille River, its plans to develop a project at Z Canyon, and the intentions of PUD and Seattle to negotiate concerning plans and systems of additions, betterments, and extensions of their respective systems (R. 38), it renewed the District's confidence that Seattle was acting in good faith.

Believing in Seattle's good faith, the PUD officially approved the Memorandum of Intent by Resolution No. 362 (Ex. D. 124).

Another development during the four-year period of negotiations came when the question of the legality of a joint venture to build and operate a dam and power plant in the Z Canyon-Boundary stretch of the Pend Oreille River was posed. At that time PUD passed Resolution No. 419 (Ex. D. 126) directing its manager to join with Seattle in securing state legislation that would remove the question. In accordance therewith, PUD's manager thereupon induced the

Senator from the District embracing Pend Oreille County to introduce a bill to legalize such a joint venture. The manager of the PUD appeared before the Legislative Committee in charge of the bill and testified in its behalf (R. Tr. 948). The bill became a law in 1957.

When Seattle had completed its investigation and report of the Boundary dam site, it proceeded to file its application, unilaterally (Ex. P. 9). Seattle did this in complete disregard of all its past pledges and activities by which it had won and held the confidence of the PUD that it would build the dam in the Z Canyon-Boundary stretch of the river as a joint venture. After a long contest before the FPC and later the United States Court of Appeals for the District of Columbia, Seattle secured a license for the construction of the Boundary dam. It now asks the court to bury its dead deeds beyond legal memory. It is now engaged in this suit to condemn all of the properties of the PUD on the Pend Oreille River needed for its dam and reservoir at the Boundary site.

Despite all this record of misleading the PUD into believing in its good faith in plans to enter into a joint venture to construct the contemplated hydro-electric project in the Z Canyon stretch of the river, Seattle now has the brazen effrontery and cold cynicism to conclude its summary of events at the end of page 53 of its answering brief as follows:

“Clearly it was this order of the FPC and not the taking of the PUD’s properties which prevented the District from constructing the Z Canyon project and integrating its operation with Box Canyon.”

By this statement Seattle admits that PUD has been prevented from constructing its Z Canyon project and integrating its operation with the Box Canyon project. This is the fact that gives rise to PUD’s claim for severance damage. Seattle says it is not responsible for what PUD has lost. It says the FPC, in granting a license which Seattle had asked and fought for, is the culprit.

Counsel for the PUD is unable to find words proper to be used in a legal brief to describe adequately in condemnatory language the treatment which Seattle has imposed upon the PUD by which it has destroyed its highly valuable opportunity and plans for the coordination of two power plants at Box Canyon and Z Canyon.

The foregoing emphasizes the justice of an order by this court to admit a complete presentation of the evidence of the plans and uses the PUD intended to make of a power plant at Z Canyon by coordination of its operation with the operation of the Box Canyon plant, and, if severance damages should be allowed, to fix the amount of such damages which should be awarded.

In attempting to support the district court's pre-trial order forbidding the PUD even to present any evidence to enable the court to determine whether the PUD should be awarded severance damages, Seattle cites the opinions of federal courts, especially in connection with the *Grand River Dam Authority* case in both the supreme and appellate courts (175 F. Supp. 153-57, and 363 U.S. 229, 233). In that case, the court of claims denied severance damages, saying damages were "indirect and consequential." In this situation, as in every case where a court's opinion is cited as a precedent for the ruling contended for, the facts must be examined to learn if they are even similar to the facts in the case at bar. The facts in these cases are so widely different that the opinions cannot be considered applicable.

In the first place, that case involved a contest between the United States and the state government Authority of Oklahoma. The controlling fact in that case was that the doctrine of dominant servitude applied. Congress had passed the Flood Control Act (55 Stat. 638, 645) directing the federal government to construct dams on the Arkansas and Grand Rivers. That freed the federal government from paying damages for property taken for the construction of those projects.

In the second place, the upstream dams on the non-navigable Grand River would not have contributed anything to the operation and production of power by the dam of the Authority which it had been licensed

to build on the Arkansas River at Pensacola before Congress passed the Flood Control Act. In the case at bar, the dam as planned at Z Canyon was to supply power to the PUD when the flood waters of the Pend Oreille River destroyed or reduced production at Box Canyon. Box Canyon is not merely planned. It is built and in operation. When the high water destroys or reduces production there, the PUD must purchase power to supply its customers including the power to be furnished Seattle under the 50 year contract. The district court's pretrial order prevented the PUD from presenting the evidence which would show that the project at Z Canyon, because of the unusual topography of the river canyon, would produce sufficient additional power during the period of flood flow not only to firm up the Box Canyon's lack of production, but to do that without interfering with the amount of its regular production of power at other periods. These facts are highly important in considering the severance question.

The third difference is that the Dam Authority had only made surveys. It had no dam in operation. It had not tested the dam foundations of the upriver dam sites, nor had plans been prepared for the construction of the projects already on file with the FPC, as is the situation with the PUD as to Z Canyon. The Coordination Agreement covering all the principal projects of the Northwest, including the Z Canyon when developed, now exists. Also, the Intertie trans-

mission lines to the tremendous and, in fact, almost unlimited market for all surplus power in the Northwest are not only authorized by Congress to be built, but are now being constructed and will be in operation by the time the Z Canyon dam could be built. Thus the market which the FPC required for renewal of the Z Canyon application will have become available.

These facts constitute evidence which the trial court should admit and consider in determining whether severance damages should be awarded, and if so, the severance value to the PUD of the properties being taken by Seattle.

One other fact is emphasized by Seattle's citations from the *Grand River Dam Authority* case, namely, the trial court had admitted the evidence in order that the court in that case might determine whether severance damages should be awarded.

Seattle refers to the opinion of the Court of Appeals for the District of Columbia in which it affirmed the FPC's grant of license to Seattle (26 FPC 65). That opinion declared the Z Canyon's property was not a part of the PUD's "electric system" protected by the state law which forbids the taking of any part of the electric system of one municipal corporation by another municipal corporation. The added statement that "even if in this situation it were effective . . . it would not prevent Seattle from con-

demning the needed land," shows that the court was not passing on the questions of severance. The Court of Appeals' decision had nothing whatever to do with severance.

The simple fact is that at the pretrial hearing the district court ruled out PUD's contention that it should be entitled to offer proof of severance damage by saying:

"I think, in this instance, there being no dam at Z Canyon, that if the rule of severance were to apply to the situation that we have here, it would be extending it unduly. I think there would be severance if Z Canyon were constructed and in operation in coordination with Box Canyon, but at this time that is merely a prospective use.

"I feel, gentlemen, that there should not be submitted to the jury any question of severance damages, and I will hold that the rule of severance damages do not apply." (R. HPO 133.)

This ruling was premature and directly contrary to the holding in *West Virginia Pulp & Paper Co. v. United States*, 200 F. 2d 100 (4th Cir. 1952), to the effect that the rule of severance damage is applicable when a portion of properties, all of which have been acquired and integrated by plans for a particular use, are taken even though the portion so taken has not in fact been actually devoted to the planned use.

Seattle's answering brief emphasizes the validity of the conclusions set out on pages 73 to 75 of PUD's opening brief. PUD is entitled to the relief as sought.

PART II.**ANSWER TO OPENING BRIEF OF SEATTLE AS APPELLANT**

Seattle's cross-appeal is premised on the contention that as the holder of a license from the FPC to construct a power project on the Pend Oreille River and under Sec. 21 of the Federal Power Act (16 USC 814) it has been cloaked with the constitutional and dominant power held by the United States Government to control and regulate navigable water in the interest of commerce. As a result thereof, Seattle says it enjoys:

1. The privilege to appropriate for its own use *without compensation* all of the shore lands owned by PUD, all of the rights held by PUD under Chapter 125 of the 1907 laws of Washington more fully above described, and all water rights and/or riparian rights held by PUD to the extent that they exist or attach below the line of ordinary high water of the Pend Oreille River; and

2. The right to condemn and take by eminent domain the uplands owned by PUD without considering their value as a site for hydroelectric power operations in determining just compensation.

It will not be disputed that the supreme court has determined that the United States enjoys the foregoing rights. There is no merit or real substance to

Seattle's argument as it is completely clear that it does not possess the government's power of dominant servitude mentioned above, nor is it entitled to any benefits that might flow therefrom or attach by reason thereof.

The thrust of Seattle's argument is that Section 21 of the Federal Power Act "confers federal eminent domain powers on licensees" and that "Congress delegated in Section 21 the full measure of its federal eminent domain powers." Even if these statements were correct, they in no way support the conclusion that as a result thereof Seattle possesses the government's power or privilege of dominant servitude. The United States does not appropriate lands or rights below the line of ordinary high water or the power value of abutting fast lands on a navigable river without compensation by exercising "federal eminent domain powers." The power of eminent domain, either federal or state, is used when property is taken for just compensation.

"Eminent domain is generally defined as the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, conditioned upon the payment of just compensation." (26 Am. Jur. 2d, Eminent Domain, Sec. 1, p. 638.)

When the United States displaces competing interests and appropriates without compensation the flow of a navigable stream for the improvement or protec-

tion of navigation, it does not do so by virtue of any federal eminent domain power; it does it by virtue of its power under the Commerce Clause of the constitution. *United States v. Commodore Park, Inc.*, 324 U.S. 386; *United States v. Twin City Power Co.*, 350 U.S. 222.

Section 21 of the Federal Power Act provides that a licensee may acquire:

“... *an unimproved dam site* or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or works appurtenant or accessory thereto . . . by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located . . . Provided, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3000.00.” (Emphasis supplied.)

It is well established that the right of an inferior body to exercise the right of eminent domain is limited by the statute in which it is granted.

“... The right of eminent domain, inherent in the Government of the United States, differs from that power delegated to inferior bodies in that such bodies are limited in the exercise of the power by a strict construction of the legislative grant, while the sovereign power is hedged about by no such limitations.” (18 Am. Jur. Sec. 17, p. 644.)

The limitation of the jurisdiction of the United States district courts to actions where the owner's claim exceeds \$3000 in itself clearly negatives any thought that congress was extending to licensees the sovereign right to appropriate any of the properties described *without compensation*. Also, the use of the words "unimproved dam site" in Section 21 is significant. When the United States is exercising the right of eminent domain with reference to the abutting fast lands on a navigable stream, there is no such thing as an "unimproved dam site." The existence of the flow of the stream is necessary before any given property may be described as an "unimproved dam site." The government's dominant servitude over that flow precludes the ownership of an unimproved dam site as against the United States. The use of these words in the statute describing what a licensee may condemn demonstrates that congress did not endow licensees with the government's dominant servitude and intended that licensees should pay just compensation for dam sites as such.

Seattle's argument that the Federal Power Act grants it the right to take or damage PUD properties or rights below the line of ordinary high water without compensation ignores Section 10(c) of that Act (16 USC 803(c)) which specifically provides:

"Each licensee hereunder shall be liable for *all damages* occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or ac-

cessory thereto, constructed under the license, and in no event shall the United States be liable therefor.” (Emphasis supplied.)

In considering the rights and status of Seattle under the Federal Power Act, further reference to the factual situation is important. As pointed out earlier in this brief at pages 33-35, the owner of shore lands on a navigable stream in Washington holds riparian and littoral rights. It was pointed out in *DeRuwe v. Morrison*, 28 Wn. 2d 797 at page 805, that the primary rights of a riparian owner include the right “*to such use of the water as it flows past his land as he can make without materially interfering with the common right of other riparian owners*” and the right “*to whatever the water produces, such as ice.*” (Emphasis supplied.)

Prior to the passage of the Washington State water code in 1917, which preserved existing rights, there were only two riparian owners of shore lands in the area on the Pend Oreille River commencing at the Boundary site near the Canadian border and running southerly upstream to a point far upstream from the present location of PUD’s Box Canyon dam. These were Hugh L. Cooper, PUD’s predecessor in interest, who owned fee title to the shore lands running from the Boundary site upstream through the Z Canyon up to Lime Creek, and the State of Washington, which owned the shore lands upstream from Lime Creek past the Box Canyon. (Exs. P. 1, 2; D. 109.)

Thus, Cooper had the riparian right in the area where he owned fee title to shore lands to use the water without materially interfering with the common riparian right of the State of Washington, the only other owner of shore lands on this stretch of the river holding riparian and littoral rights. To eliminate any charge of interference, the only right Cooper needed from the upstream riparian owner of shore lands (the State) was the perpetual right to back and hold the water of the river upon and over said state-owned riparian shore lands. This he acquired in 1915 under the authority of Chapter 125 of the 1907 session laws (Ex. P. 1).

PUD acquired everything Cooper owned. One of the conveyances from the Cooper heir to PUD (Ex. P. 8) specifically includes "Any and all water rights . . . of any and every kind or character upon or along the Pend Oreille River . . ."

As far as the State of Washington is concerned, Cooper and his successor, PUD, had the perpetual usufructuary right in the Boundary-Z Canyon area of the Pend Oreille River to use the water in that river for the generation of power. Seattle would construe the Federal Power Act as abolishing these state-recognized rights to use the water when it says that Act grants to licensees the government's power of dominant servitude over navigable streams. This power of dominant servitude was recognized long before the enactment of the Federal Power Act, and had congress

intended that licensees would be vested with power to appropriate anything without compensation, it would have been a simple matter to so provide. To the contrary, Section 27 of the Federal Power Act, Title 16 USCA, Section 821, provides as follows:

“Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”

Seattle's immodest claim that, as a licensee under the Federal Power Act, it stands in the shoes of the United States and thereby holds the sovereign's dominant servitude over the flow of the Pend Oreille River is shown to be imaginary by the supreme court decision in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239. This decision analyzes the Federal Power Act and defeats Seattle's cross-appeal. This is shown by the following quotations with emphasis supplied:

“The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use water of a navigable stream for power purposes. We agree with the Court of Appeals that it has not.” (pp. 240, 241.)

“We are not required to determine the nature of the rights claimed by respondent except to recognize that they are usufructuary rights to use the water for the generation of power.” (p. 246.)

“We conclude, as did the Court of Appeals, that, even though respondent’s water rights are of a kind that is within the scope of the Government’s dominant servitude, the Government has not exercised its power to abolish them.

“While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams, we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization. A classic example of such a clear authorization appears in *United States v. Chandler-Dunbar Co.*, 229 U.S. 53. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river’s flow for purposes of interstate commerce. It did so in explicit terms. It said:

“ ‘Sec. 11 . . . the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.

“ ‘The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all said lands and property of every kind and description, in fee simple absolute . . .

...

“ ‘Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company . . . shall cease and determine and become null and void on January first, nineteen hundred and eleven . . . ’ 35 Stat. 820, 821.

“In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court recognized the Government’s absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.

“That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties.

“The Act—

“ ‘discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States . . .

“ ‘The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce . . .’ *First Iowa Cooperative v. Federal Power Commission*, 328 U.S. 152, 171.

“The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.

“The reference in the Act to pre-existing water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

“The legislative history of the Act discloses no substantial support for the drastic policy which the commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing pre-existing water rights on a na-

tionwide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way. Representative William L. LaFollette, of Washington, a member of the House Special Committee on Water Power which reported substantially the same bill as that which in 1920 became the Federal Water Power Act, said of it in 1918:

“ ‘This bill is not based on either the Government’s ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it . . . Under this bill we only allow the commission a supervisory power over those functions entirely within the State’s jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue.’ 56 Cong. Rec. 9110.

“ ‘Shortly thereafter he added:

“ ‘If we put in this language (of Sec. 9(b)), which is practically taken from that Supreme Court decision (*United States v. Cress*, 243 U.S. 316), as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property

. . . We are earnestly trying not to infringe the rights of the States.’ *Id.*, at 9810.

“In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In *Ford & Son v. Little Falls Co.*, 280 U.S. 369, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner’s right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complainant’s private proprietary water rights, existing under New York law, to use navigable waters for power purposes.

“(E)ven though the rights which the respondents (the riparian owners) here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation.’ *Id.*, at 377.

“After quoting from Secs. 10(c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee’s acceptance of the conditions of the Act), the Court added:

“ ‘While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by Sec. 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner (the licensee), by acceptance of the license under the provisions of Sec. 6, must be deemed to have agreed to recognize and protect.’ *Id.*, at 378-379.

“Parallel reasoning has been applied in a case involving a conflict between a licensee and the holder of state-recognized rights to use water from a navigable stream for irrigation purposes. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734. See also, as to state-created water rights for power purposes, *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 372; *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co.*, 99 F. 2d 902; *United States v. Central Stockholders' Corp.*, 52 F. 2d 322; *Rank v. Krug*, 90 F. Supp. 773, 793; *Great Northern R. Co., v. Washington Electric Co.*, 197 Wash. 627, 86 P. 2d 208.

“In *First Iowa Cooperative v. Federal Power Commission*, 328 U.S. 152, at 175-176, Sec. 27 of the Act was discussed in relation to conditions controlling the approval of projects. *The lang-*

uage there used is applicable to proprietary water rights for power purposes as well as those for other proprietary uses. To any extent that statements in Alabama Power Co. v. Gulf Power Co., 283 F. 606, cited in the First Iowa case, indicate a different interpretation, they are not controlling.” (pp. 248-256.)

It will be noted in the quotation above that the United States supreme court found the 1909 Act with which the court was concerned in the Chandler-Dunbar case to be very much unlike the Federal Water Power Act. This belies the statement on page 74 of Seattle’s opening brief as appellant that the two acts are similar.

On page 70 of its aforementioned brief, Seattle cites *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, calling attention that the decision was cited with approval in *First Iowa Hydro-electric Coop. v. Federal Power Commission*, 328 U.S. 152 at 176. The *Alabama Power Co.* case was cited in the *First Iowa* case in support of a statement that, “The effect of Section 27 in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature.” In this connection it should be noted in the quotations from the *Niagara Mohawk Corp.* case, *supra*, that the supreme court, when referring to Section 27 of the Federal Power Act and the *First Iowa* decision, said:

“The language there used is applicable to *proprietary water rights for power purposes* as well as those for other proprietary uses. To any extent that statements in *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, cited in the First Iowa case, indicate a different interpretation, they are not controlling.” (Emphasis supplied.)

In *Great Northern Railway Co. v. Washington Electric Co.*, 197 Wash. 627, cited with approval in the *Niagara Mohawk Power Corp.* case above, it appears the Great Northern Railway Company, under an arrangement with the State of Washington, was occupying with a track embankment certain state-owned shore lands and stream bed below the line of ordinary high water on the Columbia River, a navigable stream. Although the railway company held only a right of occupancy from the state, in contrast to legal title held by PUD in the case at bar, the court concluded that the railway company had a property right in the embankment. This property of the railway company was damaged by the actions of the holder of a license issued under the Federal Power Act. The identical contention was made as is herein made by Seattle that the licensee was not liable for damage to property below the line of ordinary high water because the licensee possessed the government's right of dominant servitude over the flow of the stream. In rejecting this contention and holding the licensee liable, the Washington supreme court said at page 641:

“But, from the fact that all damage done to structures in navigable waters belonging to private parties is *damnum absque injuria*, when the United States acts directly in improving navigation, it does not follow that the same rule applies when it improves navigation through the medium of a licensee. *The licensee in such a case gets no part of the sovereign power over navigable waters which belongs to the Federal government. He gets only those powers which are specifically granted in the license, and no more, and they are not only subject to strict construction, but also to definite limitations prescribed by the water power statute.*” (Emphasis supplied.)

In *United States v. Twin City Power Co.*, 350 U.S. 222, at page 225, it is said:

“The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States v. Gerlach Live Stock Co.*, *supra*, and *Federal Power Commission v. Niagara Mohawk Power Corp.*, *supra*. We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose.”

Seattle has clearly demonstrated its own lack of confidence in its claim that its license and Section 21 of the Federal Power Act has endowed it with the sovereign's dominant servitude over the flow of the Pend Oreille River. It included in its condemnation

complaint herein all lands and rights of PUD lying below the line of ordinary high water and prayed that just compensation be fixed and awarded for the taking of said properties. It introduced evidence on its theory of the value of said properties and rights. Also, after its complaint was filed, it obtained orders from the Department of Conservation and Department of Natural Resources of the State of Washington authorizing the diversion, storing, and backing up of the river waters (Exs. P. 20, 21). None of this would have been necessary if Seattle in fact enjoyed the power of dominant servitude over this stream. It should be noted that the aforementioned order (Ex. P. 20) is specifically made subject to the right granted in 1916 to PUD's predecessor, Hugh L. Cooper, and the order (Ex. P. 21) is issued "subject to existing rights."

The municipality of Seattle is capable of many things as the history of its callous treatment of the PUD so graphically demonstrates. It is respectfully submitted, however, that Seattle has not yet reached that stage of sovereignty that will enable it to strip the PUD or anyone else of property without the payment of "just" compensation.

As was so aptly said in *United States v. Commodities Corp.*, 339 U.S. 121, at page 124:

“The word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity’.”

That is what PUD asks.

Respectfully submitted,

CLARENCE C. DILL
ENNIS AND KLOBUCHER

Counsel for Public Utility District
No. 1 of Pend Oreille County,

Appellant-Appellee

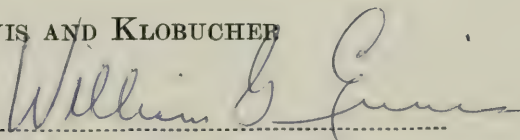
CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


CLARENCE C. DILL

ENNIS AND KLOBUCHER

By



WILLIAM G. ENNIS, of counsel
for Public Utility District No. 1
Appellant-Appellee

A P P E N D I X

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

F I L E D

Jul. 19, 1961 — Dean O. Wood, Clerk

By Mary C. Tuttle, Deputy

THE CROW TRIBE OF INDIANS OF MONTANA,	<i>Plaintiff,</i>	}	Civil No. 214
	v.		
THE UNITED STATES OF AMERICA,	<i>Defendant.</i>	}	M E M O R A N D U M

Memoranda were submitted by counsel for the respective parties on specific questions raised at the pretrial conference held September 1, 1959. These questions will be considered in order in this memorandum opinion.

QUESTION 1.

Whether by Reason of Public Law 85-523, the Court Should Modify Its Views With Respect to the Inclusion of Water Power or Dam Site Value in Determining Just Compensation, as Set Forth in the Court's Opinion in *United States v. 5,677.94 Acres of Land, etc.*, 162 F. Supp. 108.

Defendant contends that the \$2,500,000 granted plaintiff under Public Law 85-523 constitutes payment

in full for any "special value" the lands in question "might have because of the language contained in the Allotment Act and because of their adaptability for power site purposes," and that additional payment would be made only in the event it is determined by the court that "just compensation" is more than \$2,500,000. Relying upon *United States v. Twin City Power Company*, 1956, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, defendant argues that if the Big Horn River is determined to be navigable, then water power value may not be considered in determining "just compensation."

This court of course held in the condemnation action that by reason of the provisions of the Crow Allotment Act water power value may be considered as a part of "just compensation." If that conclusion is erroneous, then obviously any right of recovery for any additional sum would depend upon whether the Big Horn River is navigable.

I find nothing in Public Law 85-523 or its legislative history, however, to indicate a congressional intent that the appropriation of \$2,500,000 should cover "special value for power site purposes" in full and that the court should exclude water power value in its award of "just compensation." On the contrary, it seems clear that Congress intended to leave to the courts the question of determining whether water power value should be considered in awarding just

compensation. The concluding sentence of the Act reads:

“Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including power site and dam site value, now or hereafter claimed by the Crow Tribe, *but the same shall be determined in accordance with the Constitution and laws of the United States.*” (Emphasis added.)

The conference report on S. J. Res. 12 reads in pertinent part:

“In view of claims made in pending litigation by the tribe, the conference amendment specifically adverts to power site and dam site value but provides that this reference shall not be taken as an admission by the Government that payment of just compensation therefor is required. This is designed to avoid prejudicing any independent judicial determination of this tribal claim that may be called for in the premises. The executive branch will be free, if it chooses to do so, to maintain the position that, to use the language of the President (S. Doc. No. 128, 84th Cong.) ‘General principles of constitutional law exclude power site values in determining “just compensation” * * * ’” (House Report No. 2010, 85th Cong., 2nd Sess., pp. 3-4.)

This court’s decision in *United States of America v. 5,677.94 Acres of Land, etc.*, was before Congress when the jurisdictional act was considered and enacted. The act quite clearly was designed to avoid aiding or prejudicing either party in their respective contentions

as to whether power site value is an element of just compensation. Congress did not attempt to enlarge or restrict existing law with respect to what elements of value the court should take into consideration. It is my conclusion that the \$2,500,000 grant was intended to include all elements of value and that the court should determine (1) what elements of value should be considered in determining just compensation; and (2) whether any additional compensation is owing for the taking, and if so the amount thereof. In other words, it is the function of the court to determine "just compensation" as though Public Law 85-523 had not been enacted; and, if the amount exceeds \$2,500,000, to enter judgment for any excess.

QUESTION 2:

The Particular Elements of Damage Which Should Be Considered in Determining Just Compensation for Water Power or Dam Site Value of the Lands Described in the Aforesaid Jurisdictional Act.

Although counsel have filed comprehensive briefs setting forth their views regarding the elements of value which should be considered in determining just compensation, I find it difficult to arrive at a definitive conclusion on many points upon which there is disagreement. It is possible that some of these differences may be resolved following another pretrial conference, where counsel will have an opportunity to present their respective contentions and indicate more

specifically what evidence they intend to offer. A determination of other questions will no doubt depend upon the evidence produced at the trial. This memorandum will simply set forth my tentative conclusions on some of the points in controversy so that counsel may be better prepared to present their views at the next conference.

GENERAL PRINCIPLES

There is little dispute regarding the general principles for determining "just compensation." There is disagreement regarding their application to this case. The parties agree that the standard for measuring "just compensation" customarily is the "fair market value" as of the date of taking, and that "fair market value" means the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell it.

The bases for determining "just compensation" when property is of a kind seldom exchanged and with no "market price" are set forth in *Kimball Laundry Co. v. United States*, 1949, 338 U.S. 1, 69 S. Ct. 1434, 93, L. Ed. 1765. The general rules with respect to applying the concept of market value in determining "water power value" were well expressed in *United States v. Powelson*, 4 Cir. 1943, 138 F. 2d 343, cert. denied 321 U. S. 773, 64 S. Ct. 611, 88 L. Ed. 1067.

Various approaches were considered by the expert witnesses in the *Twin City* cases (see 86 F. Supp. 467; 114 F. Supp. 719, affirmed 215 F. 2d 592; 221 F. 2d 299). While the Supreme Court held that dam site value could not be allowed, the approaches of the various appraisers in these cases may be of some assistance in the event this court is correct in its conclusion that water power or dam site value may be allowed in the instant case. I have obtained the transcripts on appeal in those cases and will have them available for the use of counsel if desired.

Apparently the parties agree that the value of the lands must be determined on the basis of opinions offered by experts in the development of multi-purpose dams. There is apparently no intention on the part of either party to offer evidence of comparable sales or rental values as independent evidence. The question arises, however, as to the extent to which the appraisers may consider comparable sales, rental values, and property earnings in arriving at their opinions of value. (This will be discussed in more detail later herein.)

The parties apparently agree that the experts should be permitted to express an overall opinion on value after taking into account all relevant factors. There is some disagreement with respect to what factors are relevant. The factors considered by the expert witnesses are not in themselves direct evidence of the

market value of the land condemned but may be considered only for the purpose of determining what weight should be accorded to the testimony of the expert in his ultimate opinion as to fair market value. See discussion and cases cited in *United States v. Land in Dry Bed of Rosamond Lake, S.D. Cal.*, 1956, 143 F. Supp. 314.

A qualified expert should be permitted to give his reasons for his overall opinion and state the factors he has taken into consideration. If his reasons are fallacious or he has considered factors which are not relevant, these facts are usually exposed on cross examination and his testimony accordingly discredited. Except as to those factors and elements of value which are clearly improper or irrelevant, considerable latitude must be permitted the expert witnesses in using factors they deem relevant in arriving at their overall opinions of value. See discussion in *United States v. 70.39 Acres of Land, S.D. Cal.* 1958, 164 F. Supp. 451, 489.

VALUE TO TAKER

It is a well recognized rule that "value to the taker" cannot ordinarily be considered and that the "value of the property to the Government for its particular use is not a criterion." *United States v. Chandler-Dunbar W. P. Co.*, 229 U.S. 53, 81, 33 S. Ct. 667, 57 L. Ed. 1063, 1082. Defendant contends that under this

rule each appraiser "should be warned that no value can be assigned to flood control, navigation, erosion control, silting control, pollution abatement, stream flow control, or fish and wildlife conservation." The Government recognizes that if dam site value may be considered at all, values which may arise from the use and availability of the Yellowtail site "for power production, irrigation, domestic water supply, and recreation" may be considered, but contends that these values must be based only on values which a private enterpriser could realize.

Plaintiff contends (1) that there may be circumstances, of which the instant case is one, where a provable economic value cannot be excluded * * * by pinning a label "value to the taker" upon this element of value; (2) that by reason of section 10 of the Crow Act and the trust relationship between the parties, the Government cannot rely upon the principle of "value to the taker" to beat down the value of the ward's property; and (3) that in determining compensation to the Flathead Indians for use of their reservation for a power site and reservoir, "value to the taker" was used.

Plaintiff suggests, however, that any rule regarding "value to the taker" may wash out of the picture, since Yellowtail Dam as built by the Government might have navigation and flood control values, but only at the sacrifice of power and irrigation values. Plaintiff suggests that, "In private hands (where the

private owners heedless of the navigation and flood control values inherent in Yellowtail Dam) the dam's value for power and irrigation purposes might be correlatively greater than it will be in the hands of the United States."

It is my tentative conclusion that the Government's position is correct with respect to values attributable to flood control, navigation, etc., but this question will not of course be important if plaintiff proceeds on the theory set forth in the preceding paragraph.

Plaintiff states in its last memorandum relative to procedures that one approach adopted by its experts will be the method of "sharing of net benefits," in which flood control and similar benefits would be considered. It is my tentative conclusion that this approach would not be proper in a condemnation action, but I will hear both parties on this point at the pretrial conference.

It was held in *Kimball Laundry Co. v. United States, supra*, that where property has no "market price," recourse must be had to other means of ascertaining value, including "value to the owner" as indicative of value to the potential owners enjoying the same rights. While I feel that this rule is applicable here, I question whether it can be extended to include "value to the taker" in the nature of flood control, navigation and similar factors created only by the Government's demand.

TREATMENT OF INDIAN TRIBE

In *United States v. 5,677.94 acres, etc.* this court recognized the rule that Indians are entitled to the same treatment in condemnation actions as other landowners, but concluded that in the Crow Allotment Act of 1920 Congress expressly recognized the rights of the Crow Tribe to lands chiefly valuable for water power development, and that these property rights accordingly may not be overlooked in determining just compensation. While plaintiff is entitled to water power and dam site value as a part of just compensation, in determining that value plaintiff is entitled to the same treatment as any other landowner similarly situated, unless there are statutes which impel a different conclusion. Plaintiff contends that in Section 10 of the Crow Allotment Act and Section 10(e) of the Federal Power Act, Congress has made it plain that "it intended the Crow Tribe should have the full exploitable value of its chief tribal assets" and that the Government cannot excise elements of value on the ground that these elements are "value to the taker." It is my tentative conclusion that the plaintiff's conclusions are too broad and sweeping. More specifically, however, it is argued that the "rental value which the Crow Tribe might have received had a federal license been issued should, upon being capitalized, be given great weight in now setting a fair value for the land."

This contention will be given further consideration at the pretrial conference. Defendant apparently has

not commented on the effect, if any, of Section 10(e) of the Federal Power Act and the practice of the Government agencies thereunder, upon the value of the dam site itself. Counsel for the defendant are requested to present their views on this point. It is suggested also that both sides consider whether this is not in the nature of a special value to the "owner" rather than to the "taker."

COMPARABLE SALES

As noted above, apparently neither side will offer any comparable sales as substantive proof of the value of the property. Plaintiff indicates that its expert witnesses will take into consideration the purchase by the Government of Boysen Dam. Defendant argues that comparable sales may be considered only if the appraiser has prepared and submitted a statement showing the basis of comparison and covering the criteria set out on page 17 of this memorandum.

The general rule here applicable was well stated in *United States v. Johnson*, 9 Cir. 1960, 285 F. 2d 35, 41, where the court said:

"Quite obviously when evidence of the price for which similar property has been sold is offered as substantive proof of the value of the property under consideration, a foundation should be laid showing that the other property was sufficiently near that in question, and that it was sufficiently like the property in question as to character, situ-

ation, usability and improvements to make it clear that the two tracts were comparable in value. However, where evidence of sales of similar property is offered not as substantive proof of value, but merely in support of, and as background for, the opinion of an expert as to the value of the land in question, the requirement of such foundation is not so strict. As was stated by Chief Judge Parker in *United States v. 5139.5 Acres of Land etc., supra*, 'If the expert has made careful inquiry into the facts (of such sales), he should be permitted to give them as the basis of the opinion he has expressed. If he had not made careful inquiry, this will be developed on cross examination.' "

The court in the *Johnson* case relied largely upon *United States v. 5139.5 Acres of Land, etc.*, 4 Cir. 1952, 200 F. 2d 659; and *United States v. 25.406 Acres of Land, etc.* 4 Cir. 1949, 172 F. 2d 990, cert. denied 337 U. S. 931, 69 S. Ct. 1484, 93 L. Ed. 1738.

RENTAL VALUE.

Plaintiff indicates that its expert witnesses will consider the rentals paid for use of Indian tribal lands for the Kerr and Pelton Dam Sites. Defendant contends that these situations are wholly dissimilar and should not be considered.

It is my tentative conclusion that if the expert witnesses conclude that the situation with respect to these dam sites are sufficiently similar to aid in arriving at a valuation of the Yellowtail Dam Site and would

have been considered by a prospective purchaser, the experts may take these rentals into consideration and give their reasons for their conclusions. The defendant may of course offer proof of dissimilarities. The court must then consider the weight of any evidence of value which may have been determined in part from considering these rental values.

PROSPECTIVE EARNINGS

Apparently the parties agree that prospective earnings may be considered by the expert witnesses as one of the factors to be weighed in determining market value.

LOCATION FACTOR

The parties agree that the location of a site has relevance in determining value. Defendant contends, however, that plaintiff may not attribute a value to an upstream location which is conditioned upon Congress passing a law which will permit an upstream dam site owner to collect charges from the Government for benefits to the Government's downstream dams. Plaintiff contends that "there is such a prospect of legislation as any prospective purchaser would necessarily take into account" and that, "economic practicalities would force downstream dam owners and the Yellow-tail Dam owner together, since joint operation unquestionably would result in immense benefits."

It is my tentative conclusion that the question of whether this factor may properly be considered will depend to some extent upon the evidence, and may well go to the weight rather than competency of any opinion which may take it into consideration.

QUESTION 3:

Should Water Power or Dam Site Value be Limited to the Physical Dam Site Plus the Reservoir Area on Crow Tribal Lands, or Extend to the Physical Dam Site Plus the Reservoir Area Which Extends into Wyoming, Including White Ownership and Federal Lands.

It is plaintiff's view that all water or dam site value attributable to the Yellowtail Dam Site must be attributed to the lands owned by the plaintiff, that any feasible site and the vast bulk of the natural water storage are within the confines of Crow-owned lands; and that the "Crow Tribe alone holds the unavoidably necessary lands and whether any other lands would ever be utilized is too remote or speculative to attribute any dam site or water power value to them."

Defendant contends that plaintiff owns but 20 percent of the land required for the Government's dam and reservoir project; that "the value of the Indians' interest in the Yellowtail Dam Site and reservoir site cannot be based upon the value of a dam which will flow five times the area of the land owned by plaintiff," but "must be based on a dam which will flow only the area owned by plaintiff." Defendant relies primarily upon the case of *United States v. Powelson*,

1942, 319 U.S. 266, 276, 277, 279, 87 L. Ed. 1390, 63 S. Ct. 1047.

Plaintiff distinguishes and reconciles the *Powelson* case and argues that if plaintiff is not entitled to undiminished dam site value "the amount of diminishment cannot exceed the reasonable 'market value' of other lands which may be needed for accommodation of a reservoir behind the optimum dam." Plaintiff refers to the holding of the district court in *United States v. Twin City Power Co.*, 114 F. Supp. at 724, where the court accorded full power site value to the company and deducted from the total award the "market value" of the additional lands it would have needed for the project.

The final ruling on Question 3 obviously will depend on the evidence.

Only the lands of the Crow Tribe are encompassed by the Crow Allotment Act. The non-Crow landowners may not claim water power value in determining the fair market value of their lands. A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, would consider the fair market value of the non-Crow holdings which it would be necessary to acquire to complete the project. This would have a direct bearing upon the amount he would be willing to pay the Crow Tribe for the physical dam site and reservoir land. In other words, if the plaintiff has correctly stated the facts,

a purchaser presumably would be willing to pay dam site or water power values to the Crows for a dam impounding water over the entire area less the cost of necessary acquisitions of non-Crow lands at their fair market value, (which, as noted above, would not include water power value).

QUESTION 4:

Whether the Value Should be Restricted to the 50-Year Permit Provided for under the Federal Power Act.

This question must be answered in the negative.

It is true, as defendant contends, that market value is the price a willing buyer would pay a willing seller. It is true also that section 17 of the Federal Power Act prescribes a 50-year limitation for a lease to a private enterpriser. At the end of the 50-year period the land reverts to the Indian Tribe unless there is a new lease agreement.

But here the Government is acquiring the land in perpetuity. The question is not what a willing buyer, either Government or private, would pay for a 50-year lease, but what either would pay for the fee. The Government may not take advantage of the Federal Power Act to limit the amount of just compensation for a fee title to what just compensation would be for a 50-year leasehold.

Done and dated this 19th day of July, 1961.

W. J. Jameson
United States District Judge

THE CROW TRIBE OF INDIANS
OF MONTANA, *Plaintiff,* } Civil No. 214
v. }
THE UNITED STATES OF AMERICA, *Defendant.* } O P I N I O N

Defendant acquired the lands as a site for Yellow-tail Dam and Reservoir, a multi-purpose dam designed to “provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal-industrial water and other benefits.”¹ The dam is now under construction as a part of the Missouri River Basin Project authorized by Section 9 of the Flood

1. Definite Plan Report (Ex. 31-A, p. 1).

Control Act of 1944 (58 Stat. 887). The Definite Plan Report for Yellowtail states that it is essential to the over-all plan for the Missouri River Basin.

In a comprehensive stipulation, the parties agreed, subject to objections as to relevancy and materiality, upon all facts relating to the location and characteristics of the dam site, plans for construction of the dam and its uses, construction costs, government studies, and other facts deemed pertinent by the parties and their expert witnesses. While there is no dispute as to the facts and supporting documents received as exhibits, there is a sharp difference of opinion with respect to the relevancy of certain facts and documents and their utilization by the expert witnesses in arriving at their opinions of value.

The lands in question, located on the Crow Indian Reservation in Montana, lie largely within a canyon through which flows the Big Horn River, a tributary of the Yellowstone River. The lower part of the canyon is well adapted for the construction of a hydroelectric dam and has long been recognized as a potential dam site.

The United States, in 1958, planned to acquire about 6,997 acres of Crow Tribal and allotted Indian lands within the boundaries of the Crow Reservation (inclusive of the 5,677.94 acres of tribal lands involved in this action), 10,778 acres of privately owned lands, and 2,486 acres of state owned land, for reservoir and other purposes in connection with Yellowtail Dam.

The United States also planned to include 10,604 acres held by the Government within the Yellowtail Reservoir taking area, making a total of 30,857 acres in the taking area. The dam, powerhouse and switchyard are all being constructed on the tribal land acquired by the United States pursuant to Public Law 85-523. The total estimated cost for the Yellowtail unit appearing in the 1963 budget documents is \$100,192,000.

The parties agree that the power to be produced at Yellowtail is needed to supply present and future power needs in southeastern Montana and northeastern Wyoming. The Yellowtail power development is well centralized with respect to power markets. In planning the Yellowtail power plant, it was recognized that Yellowtail Dam "afforded an opportunity to install additional firm peaking capacity economically, which when integrated with the energy supplies from other existing and prospective power installations in the area would increase the area "firm power supply."²

2. Stipulation, par. 18, p. 13, 14. The stipulation continues in pertinent part: "It was expected that the firm peaking capacity of the Yellowtail Powerplant, not associated with the firm energy produced at that plant and supplied to meet the firm power loads of the area served from the interconnected power system, would be marketed to other power systems in the area having generating installations, and would be integrated with the off-peak energy supplies of those systems in increasing the area firm power supply. After supplying a proportionate share of the irrigation pumping requirements of the Federal system, and deducting for average transmission system losses, and normal reserve requirements, it was expected that an average of some 113,500 kilowatts of firm power would be supplied to area loads with some 60,500 kilowatts marketed as firm peaking capacity, during the first 50 years of operation."

Before proceeding to a consideration of the principles applicable in determining just compensation and an analysis of the opinion evidence, it should be noted that defendant has renewed its contention that power site and dam value may not be considered in awarding "just compensation." Relying upon *United States v. Twin City Power Company*, 1958, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, and *United States v. Grand River Dam Authority* 1960, 363 U.S. 229, 80 S. Ct. 1134, 4 L. Ed. 2d 1186, defendant argues that if the Big Horn River is determined to be navigable, then water power value may not be considered.

This court held in *United States v. 5,677.94 acres of land, etc.*, 1958, 162 F. Supp. 108, that by reason of the provisions of the Crow Allotment Act of 1920, water power value may be considered as a part of just compensation.³ In a pretrial brief in this case, defendant argued additionally that the \$2,500,000 granted plaintiff under Public Law 85-523 constituted payment in full for any "special value" the lands in question "might have because of the language contained in the Allotment Act and because of their adaptability for power site purposes," and that additional

3. By S. J. Res. 135 (84th Cong. 2d Sess.) Congress had appropriated "\$5,000,000 as just compensation" for the transfer of the lands here involved. On June 7, 1956, the joint resolution was vetoed by President Eisenhower, the veto message reading in pertinent part: "General principles of constitutional law exclude power site values in determining 'just compensation' as the Supreme Court recently reiterated in *United States v. Twin City Power Co.*, January 23, 1956." In the condemnation action, this court distinguished *United States v. Twin City Power* on the basis of the treaty with the Crow Tribe and recognition by Congress in the Crow Allotment Act of 1920 of a property right of the Crow Tribe in water power value of the lands in question.

payment may be made only in the event it is determined that "just compensation" (without water power value) is more than \$2,500,000.

I find nothing in Public Law 85-523 or its legislative history, however, to indicate a Congressional intent that the appropriation of \$2,500,000 should cover "special value for power site purposes" in full and that the court should exclude water power value in its award of "just compensation". On the contrary, it seems clear that Congress intended to leave to the courts the question of determining whether water power value should be considered in awarding just compensation. The concluding sentence of the Act reads: "Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including power site and dam site value, now or hereafter claimed by the Crow Tribe, *but the same shall be determined in accordance with the Constitution and the laws of the United States.*" (Emphasis added.)⁴ This court's decision in *United States of America v. 5,677.94 Acres of Land, etc.* was before Congress when Public Law 85-523 was enacted. The Act was designed to avoid aiding or prejudicing either party in their respective contentions as to whether power site value is an element of just com-

4. See also Conference Reports on S. J. Res. 12, House Report No. 2010, 85th Cong., 2d Sess., pp. 3-4, and discussion of report in both House and Senate, 104 Cong. Rec. pp. 12975 to 12980, p. 13006.

pensation. Congress did not attempt to enlarge or restrict existing law with respect to what elements of value the court should take into consideration.

Plaintiff is entitled to just compensation for the property transferred. The parties agree that the standard for measuring "just compensation" customarily is the "fair market value" as of the date of taking, and that "fair market value" means the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell it. Where there is an established market through sales of comparable property, it is relatively simple to determine market value. In the absence of any "going market," the problem becomes more difficult. Then, "this amount can be determined only by a guess, as well informed as possible, as to what the equivalent (value) would probably have been had a voluntary exchange taken place."⁵ This concept has special relevance here. Not only is there no "going market," but there are also many intangible and uncertain factors which make difficult the application of any of the standard and recognized approaches to the valuation of property. Obviously this accounts in part for the wide variation in the opinions of value given by the expert witnesses for the respective parties.

5. *Kimball Laundry Co. v. United States*, 1949, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L. Ed. 1765. See also *United States v. Powelson*, 4 Cir. 1943, 138 F. 2d 343, cert. den. 321 U.S. 773, 64 S. Ct. 612, 88 L. Ed. 1067.

Two well qualified expert witnesses testified for each party: for the plaintiff, Dr. Hershel F. Jones, an economist employed as a consultant by H. Zinder & Associates; and J. A. Krug, former Secretary of the Interior; and for the defendant, W. L. Patterson, a civil engineer and partner in the engineering firm of Black & Veach, and Kenneth G. Tower, a civil engineer with the Federal Power Commission. All have had extensive experience in analyzing power supply problems, rates, power markets and transmission.

The expert testimony was involved, technical and complicated. All the expert witnesses were obviously and understandably partisan, as reflected in their opinions of just compensation. Jones and Krug expressed the opinion that the lands acquired were worth at least \$12,500,000. Using nine different methods or variations of methods, they arrived at figures ranging from \$10,300,000 to \$26,650,000. On the other hand, Patterson and Tower were of the opinion that the \$2,500,000 already paid exceeds the dam site value of the lands taken.

All of the experts agreed that an accepted method for valuing potential water power sites is to compare the cost of producing power at that site with the cost of providing an equivalent amount of power by the least expensive, practicable alternative method. All agreed also that the least expensive, practicable alternative here is a steam plant. After careful study

of the various methods presented for consideration, the court is of the opinion that a value established by this method would be most likely to result in an award of "fair market value," insofar as the production of an equivalent amount of power is concerned. Plaintiff claims, however, that consideration must be given also to the superior peaking capacity of the hydroelectric plant and to "important collateral benefits." These benefits will be discussed later herein.

In comparing a single purpose hydroelectric plant with a steam plant alternative, Dr. Jones arrived at a dam site value of \$19,139,000. This sum represents the difference between the estimated cost of a steam plant of \$98,784,000 and the cost of a single purpose hydro plant of \$79,655,000.

In arriving at the estimated cost of the steam plant, Dr. Jones first used figures contained in a 1950 Bureau of Reclamation report on Yellowtail, estimating the cost of a steam plant alternative at \$96,531,355. By using data made available as of 1958 and 1961, Dr. Jones updated this figure to \$98,794,000, computed as follows:

Steam Construction Cost		
200,000 kw at \$160/kw		\$32,000,000
Steam Annual Costs		
O & M	\$2,553,000	
Replacement	518,000	
Total		\$3,071,000

Hydro Annual Costs			
O & M	225,000		
Replacement	250,000		
Total		475,000	
Difference		\$2,596,000	
Capitalized at 3%			66,794,000
			\$98,794,000
			(Ex. 2)

Dr. Jones arrived at his estimated cost of a single purpose power project at Yellowtail as follows:

"1. USBR 1961 estimate of total costs of Yellowtail Unit as shown by stipulation		\$100,192,000
2. Engineering, overhead and other indirect costs included in Item 1		17,413,000
3. Direct construction costs		\$ 82,779,000
4. USBR estimate of cost to Crow tribal lands included in Item 3	\$2,500,000	
5. USBR estimate of cost of tourist and recreation facilities included in Item 3	532,000	
6. Estimated separable cost of flood control included in Item 3	5,949,000	
7. Estimated separable cost of irrigation included in Item 3	595,000	
8. Subtotal		9,576,000
9. Direct construction cost net of the cost of Crow tribal lands, tourist and recreation facilities, and flood control allocation		73,203,000
10. Engineering, overhead, and other indirect cost at 8.1% of total construction costs		6,452,000
11. Total estimated construction costs of Yellowtail Unit after subtracting costs of Crow tribal lands, and separable costs of tourist and recreation facilities, irrigation and flood control, and after adjustment of indirect costs		\$ 79,655,000
		(Ex. 5)

Mr. Krug did not make separate calculations of value himself, but agreed generally with Dr. Jones' methods and conclusions.

Defendant and its expert witnesses question Jones' approach in four particulars, contending (1) that the Bureau of Reclamation figures prepared in 1950 and used as a basis for Jones' study were not compiled to reflect dam site value but were intended solely for the purpose of allocating funds between power and flood control;⁶ (2) that Jones failed to include the cost of interest during construction; (3) that he erroneously reduced the engineering and overhead costs from \$17,413,000 to \$6,452,000; and (4) that the 3 percent rate of capitalization is too low.

Patterson would revise Jones' compilation as follows:

	Jones	Federal Project (3%)	Non Federal Public Project (5%)
Steam Construction Cost	\$32,000,000	\$32,000,000	\$32,000,000
Steam Annual Costs			
O & M	2,553,000	2,553,000	2,553,000
Interim Replacements	112,000	112,000	112,000
Depreciation (35 yr. Sinking Fund)	406,000	529,257	354,295
Interest (\$32,000,000 Plant)	—	960,000	1,600,000
Total Annual Costs	\$ 3,071,000	\$ 4,154,257	\$ 4,619,295
Certain Hydro Annual Costs			
O & M	225,000	225,000	225,000
Interim Replacements	250,000	250,000	250,000
Insurance	—	95,828(1)	101,000(1)
Total Certain Hydro Annual Costs	\$ 475,000	\$ 570,828	\$ 576,000
Difference	\$ 2,596,000	\$ 3,583,429	\$ 4,043,295

6. Dr. Jones readily admitted that the purpose of the Bureau's 1950 compilation was to allocate costs and, he added, to "convince Congress that Yellow-tail was a good project." When asked for his own opinion on the Bureau's compilation, Dr. Jones' answers were somewhat equivocal. He emphasized the fact that they were the Bureau's own figures and said he would "rely upon it to some degree," but would also want to look at calculations similar to others he had made.

	Federal Project (3%)	Non Federal Public Project (5%)
Difference Capitalized at Interest Rate for 50 years equals Comparable Steam Alternative	\$92,200,793 (2)	\$73,814,086 (3)
Hydro Plant Investment	95,827,650 (4)	101,000,000 (5)
Amount Hydro Plant Investment Exceeds Comparable Steam Alternative	3,626,857	27,185,914
(1) .1% of hydro plant investment		
(2) \$3,583,429 divided by .03886549 —	\$92,200,793	
(3) \$4,043,295 divided by .05477674 —	73,814,086	
(4) Total cost Yellowtail Unit	100,192,000	
Less		
Crow Land	2,500,000	
Tourist and Recreation Facilities	630,000	
Flood Control	7,200,000	
Irrigation	720,000	
Sub total	\$11,050,000	
Balance	\$89,142,000	
Interest during Construction (7.5%)	6,685,650	
Total Hydro Plant Investment	\$95,827,650	

(5) Exhibit 11

(Ex. 50)

It will be noted that on a 3 percent federal project, Patterson arrives at a hydro plant investment of \$95,-827,650 as opposed to Jones \$79,655,000 — a difference of \$16,171,650. This results from (1) the inclusion of engineering, overhead and other indirect costs at \$17,413,000, an increase of \$10,960,000 over Jones'

\$6,452,000; (2) the inclusion of \$6,685,650 interest during construction; and (3) a deduction of \$11,050,000 for flood control, irrigation, and recreation, an increase of \$1,474,000 over Jones' \$9,576,000.

In his own compilation, Patterson arrived at a cost of \$111,360,000 for a single purpose hydro project, based on Bureau estimates, as of August 8, 1958, of \$109,300,000 for a multi-purpose project. This included interest during construction in the amount of \$10,123,400, computed at 10 percent of total, excluding land and land rights. On the basis of 1963 budget documents, Patterson reduced his estimate of cost for a single purpose unit to \$96,800,000.⁷

7. On the basis of the 1963 budget estimates for a multi-purpose project Patterson arrived at an investment cost of \$96,800,000 for a single purpose hydroelectric project as follows:

Investment cost multi-purpose project	\$100,192,000
Adjustments	
Land and land rights	3,900,000
Separable flood control costs exclusive of land and land rights	6,800,000
Separable irrigation costs exclusive of Yellowtail Camp	600,000
Observation building	130,000
Recreational development	500,000
Rehabilitation of fish	65,000
Yellowtail Camp	203,000
Total adjustments	\$ 12,198,000
Total investment cost excluding adjustments	87,994,000
Interest during construction	8,799,400
Total	\$ 96,793,400
Use	\$ 96,800,000

(Ex. 43)

Patterson computed the cost of an alternative steam plant at \$37,600,000, as follows:

180,000 kw at \$190	\$34,200,000
(3 60,000 units, which he testified would be capable of gross continuous capacity of 205,000 kw)	
Substation costs	3,000,000
Land Costs	400,000
	<hr/>
Total	\$37,600,000

(Patterson, Direct Testimony, p. 61)

Patterson estimated the annual expenses for the steam plant at \$2,579,915 and for the hydro plant at \$350,000, resulting in a difference of \$2,229,715.

Patterson did not capitalize this amount and add the resulting figure to the cost of the steam plant,, as did the Bureau and Jones. Instead he figured annual depreciation and interest costs for a 50-year period. For the hydro plant, with an estimated cost of \$111,360,000, he used an annual depreciation charge of \$1,551,155, or approximately 1.40 percent of the gross plant investment, basing this allowance on the useful life of the dam and reservoir and estimated average service lives for other items of the plant. For the steam plant, with an estimated investment of \$37,600,000, he used an annual depreciacion charge of \$1,074,286, or approximately 2.86 percent of the gross plant investment, based on an estimated average service life of 35 years.

Starting with the hydro plant investment of \$111,360,000 and deducting the equal annual depreciation

charge of \$1,551,155, Patterson determined the amount of remaining investment for each year of the plant's operation. Applying a 4 percent interest charge to the remaining total for each year, he determined the amount of annual interest. Under this method, in the first year of operation, the hydroelectric plant depreciation cost was \$1,551,155, the interest cost \$4,454,000, and the cost of operation \$350,000, for a total of \$6,355,555. For the steam plant operation for the first year, the depreciation cost was \$1,074,286, the interest cost \$1,504,000, and the operation costs \$2,579,750, for a total of \$5,158,001, or \$1,197,554 less than the annual cost for the hydroelectric plant.

In the 35th year, for the hydroelectric plant the depreciation cost was \$1,551,155, the interest cost \$2,524,589, and the operating cost \$350,000, for a total of \$4,425,744. For the steam plant, depreciation was \$1,074,286, the interest cost \$42,971, and the operating cost \$2,579,715, for a total of \$3,696,962, or \$728,782 less than the annual cost for the hydro plant.

Summarizing the present worth of the annual cost for each plant for the 50-year period resulted in costs of the hydroelectric plant of \$16,660,700 more than for the steam electric plant.

Patterson also made comparisons on the basis of continued inflation trends, and used a second method, which he termed practical financing. The following table shows the results of those computation:

**Excess Cost of Hydroelectric Plant
Over Steam Electric Plant**

	Present Cost Levels	With Continued Inflation Trends	Equal Weighting of Present Cost Levels & Continued Inflation Trends
	\$	\$	\$
Amortization and Interest			
Fixed Charges on the Basis of Equal Annual Depreciation over the Expected Service Life of the Facilities with Annual Interest Costs Computed on the Remaining Value of the Investment	16,660,700	2,259,000	9,459,850
Practical Financing			
Fixed Charges on the Basis of Securities Necessary to Finance the Construction and Continued Operation of the Facilities	22,539,100	8,180,100	15,359,600

(Ex. 27)

Jones contended that Patterson's procedures for calculating present values over a 50-year period were erroneous in that: (1) It is impossible to estimate with accuracy the annual costs for each of 50 years, since this would necessitate knowing the replacement cost for each hypothetical plant rather than using broad averages of service lives of equipment; (2) Patterson failed to consider the value of the remaining undepreciated hydroelectric plant; (3) The inability to detail year by year the replacement requirements of a steam plant and failure to take into account the fact that a steam plant requires more replacements than a hydro plant in the earlier years of the 50-year analysis; (4) Patterson's reliance upon a nameplate rating of 180,-

000 kilowatts to provide a continuous capability of 205,000 kilowatts for a steam plant, since a hydro plant also has a greater peaking capability than its name-plate rating.

Using data from Patterson's exhibits and making what he deemed necessary adjustments, Jones arrived at the following results:

Example of Use of Present Worth of Average Revenue over 50 Years

	50-Year Total Annual Cost	50-Year Average Annual Cost	Present Worth of Annuity at 4% of 50-Year Average Annual Costs
	\$	\$	\$
Without Inflation			
Hydro Plant	219,244,175	4,384,884	94,196,078
Steam Plant	227,820,032	4,556,401	97,880,606
			<hr/>
Steam excess over Hydro			3,684,528
With Inflation			
Hydro Plant	235,944,400	4,718,888	101,372,096
Steam Plant	290,155,878	5,803,118	124,952,737
			<hr/>
Steam excess over Hydro			23,580,641
Average	$\frac{3,634,528 + 23,580,641}{2} = 13,632,584$		

(Ex. 59)

**Example of Consideration of Present Worth
of 50th Year Undepreciated Plant**

	Present Worth of 50 Year Annual Cost	Deduct Present Worth of Undepreci- ated Plant	Net Present Worth of 50 Year Costs
	\$	\$	\$
Without Inflation			
Hydro Plant	105,369,425	7,538,104	97,830,721
Steam Plant	103,441,368	3,383,999	100,057,369
			<hr/>

Steam excess over			
Hydro			2,226,648
With Inflation			
Hydro Plant	109,717,314	8,732,713	100,984,601
Steam Plant	122,324,444	4,793,784	117,530,660
Steam excess over			
Hydro			16,546,059
Average	$\frac{2,226,648 + 16,546,059}{2} - 9,386,354$		

(Ex. 60)

Plaintiff's counsel in their reply brief contend that if Patterson had "modernized his assumptions" in Exhibit 50, he "would have concluded that the Yellow-tail site was worth at least \$5,706,000," instead of having a negative value of \$3,626,857. The computations are summarized as follows:

	Patterson	Revised
Steam Construction Cost at \$160/kw	\$32,000,000	\$ 33,600,000
Steam Annual Costs	4,154,257	4,517,000 ^a
Certain Hydro Annual Costs	570,828	570,823
<hr/>		
Difference between Steam and Hydro	\$ 3,583,429	\$ 3,946,172
Capitalized Difference at .03886549	\$92,200,793	\$101,534,000
Hydro Plant Investment	95,827,650	95,827,650
<hr/>		
Excess of Steam Plant Alternative	— \$ 3,626,857	\$ 5,706,350 ^a

(Plaintiff's Reply Brief p. 14)

Through different approaches, Tower arrived at values of the dam site ranging from \$1,300,000 to

8. In revising the annual costs for steam, plaintiff increased Patterson's costs, discredited the conclusions of the other party's experts and arrive at widely divergent figures.

9. This illustrates how both sides, by changing a few basic assumptions in estimate of operation and maintenance from \$2,553,000 to \$2,835,000, interim replacement from \$113,000 to \$118,000, depreciation from \$529,237 to \$556,000, and interest from \$960,000 to \$1,008,000.

\$1,540,000, but testified that he would “prefer to attach no particular significance to either (figure) other than to say that they are indicative of the fact that the power site value properly creditable to the Crow Indian Tribe on the basis of a single-purpose power project analysis is less than \$2.5 million.” Jones submitted what he considered necessary adjustments in Tower’s computations, which Jones concluded would justify a payment of at least \$12,500,000.¹⁰

Each side has been more persuasive and convincing in showing the fallacies in the methods used by the experts for the other side than in defending the methods and conclusions of its own experts. Obviously, if Patterson and Tower are correct in their analyses and conclusions, the plaintiff has been overpaid. The crux of the case is whether the plaintiff, through its experts (including revision of defendants valuations), has assumed its burden of showing a value in excess of \$2,500,000 and if so, the amount thereof.

10. Tower testified that the best possible single-purpose power development would be a 400,000 kw station with the dam at elevation 3610. He computed the value of the site to the Crows on the basis of “net benefits.” After dividing the net benefits equally between the site and the project, he computed the Crows’ proportionate share of the site benefits at 31.3% by reason of the fact that the tribal lands “comprise only slightly more than 31% of the total land necessary for the project development.” On this basis he arrived at a site value of \$1,280,000. Increasing the tribal share from 31.3% to 37.7% (and assuming “holdup” prices for other lands) resulted in a site value of \$1,300,000. A similar computation at 37.7% without using “holdup” values resulted in a site value of \$1,540,000. Through “revising” Tower’s assumptions and figures, plaintiff’s experts on this basis arrived at a valuation in excess of \$12,500,000. In addition plaintiff argues that a dam built to elevation 3610 would inundate but 7088 acres, so that the taken lands would “appear to constitute 75% of all acreage required.” (Plaintiff’s Reply Brief, p. 86, referring to Ex. 31 (b), Drawing 32.)

Plaintiff's method of comparing the cost of Yellow-tail with a steam plant alternative is, in my opinion, subject to the fallacies suggested by the defendant, i.e., the failure to include interest during construction, using a cost for engineering and overhead substantially below the actual cost to the Government, and a low capitalization rate.

With respect to their other methods of valuation, the plaintiff contends (1) that the large prospective earnings from the Crow Tribe's development of the dam site establish a value of at least \$13,000,000; (2) that applying the formula negotiated with the Portland General Electric Company for the two dam Pelton-Round Butte Project on lands of the Warm Spring Indians results in a value of at least \$11,500,000; and (3) applying the benefit-sharing method demanded by the Interior Department in fixing the rental to be paid the Flathead Indians by Montana Power Company for the third unit of Kerr Dam results in a value of over \$16,000,000.

While these approaches were proper, I am compelled to conclude that they are of limited value in determining the dam site value. From the evidence as a whole, I am unable to find that as of July 15, 1958, or today, there was any reasonable prospect of the Crow Tribe developing a single-purpose power project; nor is there any evidence that any private utility was interested in doing so. The only feasible project was

the multi-purpose dam, which the United States is in fact constructing.

Acceptance of the contentions of the Government and the testimony of its experts in their entirety might raise a serious question of the economic feasibility of the construction of Yellowtail by the Government as well as anyone else. The Government, however, is in fact constructing the dam and presumably considers it an economically sound venture.¹¹ The Crow Tribe is entitled to just compensation for the site which is being used in the construction of the dam.

The dual role of the Government, and particularly the Department of Interior, in the acquisition of this dam site was considered in the condemnation action (162 F. Supp. 108, at 117, 118). As set forth in that opinion, the Secretary of the Interior and the Department's Solicitor, in expressing their views on the original bill to compensate the Crow Tribe for the Yellowtail dam site, recognized that the Department's relationship with the Tribe is in many respects analogous to a trustee. At the same time, in acquiring the rights of the Tribe, the Government has contended that water power value may not be allowed and that just compensation must be limited to what in effect would be

11. In many respects I find it difficult to reconcile the Government's evidence and contentions in this case with statements made to Congress and press and magazine articles emphasizing the importance and value of the dam site.

a nominal value for grazing and timber purposes.¹² The situation was summarized by the Solicitor: “*** it is a very profound question and, to these Crow Indians a very vital legal question, as to whether or not this power-site feature is a compensable item. If it is, they get a lot of money; in anybody’s language they get a lot of money. If it is not, if you are going to step in there and condemn the land and only pay the naked land value, then, Senator, so far as the Department is concerned, and as the guardian of Indian affairs, I think we all would hesitate to do that.”¹³

The Department of the Interior has been zealous, and properly so, in making certain that the Indian tribes owning the lands in the Pelton-Round Butte and Kerr projects received full rental value for their power sites. As set forth *supra*, it is difficult in this case to draw any exact analogy with either of those projects by reason of many dissimilarities, and the evidence accordingly is of limited value. The Government’s representation of the Indian tribes in these rental projects does, however, manifest a policy to

12. Roger C. Theusen, land appraiser for the Department, testified that the market value of the lands acquired from the Crow Tribe as of July 15, 1958, was “\$39,750 for the 5,677.94 acres.” This approach appears inconsistent with the provision of Section 10 of the Crow Allotment Act of 1920 that the lands “chiefly valuable for the development of water power shall be reserved from the allotment or other disposition for the benefit of the Crow Tribe of Indians.”

13. From testimony of Solicitor of the Interior Department before the Senate Committee on Interior and Insular Affairs (84th Cong. 1st Sess.) at hearings on “Yellowtail Dam — Hardin Unit, Montana,” pp. 107-108, Dec. 9, 1955. See also footnotes 12 and 14 at pp. 117, 118, 162 F. Supp.

make certain that the Indians receive full value for their property rights in any dealings with private utilities. The Crow Tribe is entitled to the same consideration in this action.

There is disagreement as to the installed generating capacity of the dam. The Definite Plan Report (Vol. I, p. 19) states that, "The required installed capacity to provide for normal peaking would be about 130,000 kilowatts. However, with a present and growing shortage of peaking capacity for other systems to be interconnected with Yellowtail it is proposed to increase the installed capacity to 200,000 kilowatts." Plaintiff argues in its brief that, "The dam now is obviously planned as a 260,000 kw power plant." In disputing this figure defendant states that it does not know the source of plaintiff's information, that in any event it is hearsay, and that "at least, the officials in the Bureau and in Washington state that they have not been so advised." Yet, in a press release on August 17, 1963 (approximately three months after the last brief was filed) the Regional Director in Billings is quoted as saying that the plans have changed to increase the capacity to 250,000 kw.¹⁴

14. The news story reads in pertinent part: "Yellowtail Dam is going to get more muscle. About 20 per cent more than in original plans, Bruce Johnson, of Billings, Region 6 director for the Bureau of Reclamation, said Friday. Plans have been changed to increase the dam's installed generating capacity to 250,000 kilowatts." (Billings Gazette, August 17, 1963, p. 5.) An article on "The Missouri Basin's Best Dam" in August 29, 1963 issue of Engineering News Record also states that the powerhouse capacity will be 250,000 kw.

While it is true, as defendant contends, that this is hearsay, it is difficult for the court to conclude that the dam has a capacity of 200,000 kw when a responsible official of the Government, prior to the court's opinion, issues a press release that the capacity has been increased to 250,000 kw. Obviously, the increase of capacity from 200,000 to 250,000 kilowatts with little, if any, additional cost would result in an increase in the value of the site. It is impossible from the evidence to determine any precise amount or percentage of increase in site value.

Whatever the generating capacity, it seems clear that Yellowtail is being constructed primarily as a peaking plant. The stipulation (par. 18, pp. 13-14) contains the following:

“It was evident, however, that due to the high head available and the advantages of a short penstock installation, the Yellowtail Dam afforded an opportunity to install additional firm peaking capacity economically***.

“Design of the powerplant was based on operating the reservoir at sufficiently high levels to assume full peaking capacity from the powerplant at practically all times.***”

In the Government's brief (p. 46) it is stated: “Furthermore, the annual kwh which can be produced at the hydro plant on this site is entirely dependent on the stream flow and the storage of water. *The plant is designed for peaking capacity only.*” (Emphasis added.)

Plaintiff argues that the peaking capability renders the power more valuable. There is substantial testimony that the peaking capability of a hydro plant like Yellowtail commands a higher value (by 5 to 10 percent) than the peaking capability of a steam-electric plant.¹⁵ Defendant, in its brief, recognizes that "peaking power may have a unique value within a system."

The basis for an adjustment in favor of Yellowtail by reason of its peaking capability is also found in Bureau of Power Technical Memorandum No. 1 (Ex. 63) where under the title "Hydro-Steam Capacity Value Adjustment" (p. 7-8) it is said in part:

*"Some hydroelectric plants are particularly well adapted for serving peak loads *** Under favorable water conditions they may supply capacity in excess of their dependable capacity, making possible savings in over-all system costs. Also, in contrast to the relatively simple hydroelectric plant involving rugged machinery operating at low speeds and temperatures, the modern steam-electric plant is an intricate and complex mechanism involving high-pressure, high-speed, and high-temperature equipment, and it is subject to more equipment outages for maintenance and repair. These considerations and others less tangible are*

15. Dr. Jones, on cross examination (Tr. p. 104) explained the value in these terms: "(K)ilowatt hours don't have the same value for many reasons. One important factor is where are the kilowatt hours located? What market are they being sold at? Another one is where are the kilowatt hours located in the load curve? Are these base load kilowatt hours or are they kilowatt hours which are available to serve peak loads, which are far more valuable kilowatt hours than base load kilowatt hours."

difficult to evaluate, so are matters which must be determined largely by the engineer's judgment. *Frequently, consideration of these factors will indicate that a credit to the hydroelectric project is warranted. The hydro-steam capacity value adjustment may range up to the equivalent of ten percent of the at-market cost of steam-electric power, but is normally equivalent to about five percent of such cost.*" (Emphasis added.)

Plaintiff's contention that it would have been practicable for the Crow Tribe itself to build a power plant at Yellowtail is predicated in large part upon the sale of the power at an average price of 8.55 mills. It is argued that, by reason of the peaking capability, investor owned utilities in the area, and particularly Montana Power Company, would be willing to purchase power at this price even though the going rate is substantially less and although a steam plant might produce power at a lower cost.

In the preparation of their expert testimony, both Krug and Patterson testified as to conversations with officials of Montana Power Company regarding that company's willingness to purchase Yellowtail power.¹⁶ There is no convincing evidence, however, that Mon-

16. This testimony was not received as direct or independent evidence of what Montana Power Company would pay for power, but simply in explanation of the factors the expert witnesses took into consideration in arriving at their conclusions. As the court said in *United States v. Delano Park Homes*, 2 Cir. 1944, 146 F. 2d 473, 475, "It is just because he is an expert, and for that reason able to give its proper weight to all data, that he is allowed to appraise the property at all." See also *United States v. Land in Dry Bed of Rosamond Lake, Cal.*, S.D. Calif. 1956, 143 F. Supp. 314; and *United States v. 70.39 acres of land*, S.D. Calif. 1958, 164 F. Supp. 451, 489.

tana Power or any other investor owned utility would pay 8.55 mills if the alternative cost through a steam plant would be substantially less than that amount.

Mr. Krug testified on direct examination that "the private power companies would be delighted to buy all of the power from Federal power projects at their best alternative cost." (Tr. p. 189). In rebuttal he referred specifically to a conversation with the president of Montana Power Company, as follows:

"A. As you recall, Mr. Wheeler, I had a discussion with Mr. Corette, the president of Montana Power Company, and you were present. I asked him specifically whether his company would buy all of the Yellowtail capacity and energy at a cost to them equal to their own alternative cost for this capacity and energy. I believe I stated in my direct testimony that he gave me several reasons. I recall among them (a) that they needed this Yellowtail capacity and energy for their expected load growth, (b) that they were anxious to do everything they could to encourage the development of Yellowtail, and (c) they would like to have this Yellowtail power moving over their integrated transmission network." (Rebuttal Testimony of Krug, p. 2)

While it is clear that the private utilities would purchase Yellowtail power at their "best alternative cost," nowhere in Mr. Krug's testimony does it appear that he discussed with any official of Montana Power Company what the alternative cost might be, or more spe-

cifically whether Montana Power would pay 8.5 mills for the Yellowtail power. ¹⁷

Mr. Patterson testified that in a conversation with Mr. Woy, rate engineer for Montana Power Company, Woy "positively stated that he would not be interested in power" at 8.55 mills per kilowatt hour. There is some disagreement regarding the purport of this conversation. It seems advisable accordingly to quote the pertinent cross examination of Mr. Patterson:

"Q. Mr. Patterson would you tell me precisely what question you addressed to Mr. Woy?

A. I will as well as I can recall. I believe my question to Mr. Woy was that we were engaged in a discussion of alternative power available from a proposed steam plant in this area in this case, and we were interested in knowing whether his company would purchase any of that power and the extent of course of their interest. And his answer was that he would not be interested in any power at 8½ mills under such a situation at all.

Q. Now was this referring to Yellowtail?

17. On cross examination, Mr. Krug testified:

"Q. Have you actually inquired of anybody as to whether they would be in the market for power produced at Yellowtail, for instance, on the basis of payment of 8½ mills for kilowatt hour?

A. I have inquired as to whether the utilities in this area would pay if they — would buy if they could all of the power at Yellowtail for their alternate cost of steam, and the answer is yes, they would if they could.

Q. Did you inquire what the alternate cost of steam was?

A. I think the alternate cost of steam we have developed is right. ***"
(Tr. p. 193.)

A. It was with his knowledge that we were talking about the Yellowtail situation.

Q. I thought you said you asked him about a steam plant?

A. I did. I said we were in the Yellowtail case and involved in a discussion of alternate steam plant analysis.

Q. What you asked him was if he would be interested in buying — in purchasing any power produced at a steam plant at $8\frac{1}{2}$ mills, is that correct?

A. That is what it amounts to, with the addition of the words which I have related." (Tr. pp. 636, 637.)

In his rebuttal testimony Mr. Krug stated that "Mr. Patterson did not ask Mr. Woy the proper question," and continued: "As I recall his testimony, he inquired of Mr. Woy whether the Montana Power Company would be interested in purchasing the energy from a steam plant at 8.55 mills per kilowatt hour." (Rebuttal Testimony of Krug, p. 2.) I do not construe Mr. Patterson's testimony as limiting his conversation with Woy to whether Montana Power Company would be interested in purchasing the energy from a steam plant at 8.55 mills.

The question of what Montana Power and other private utilities would pay for Yellowtail power could easily have been resolved by calling a representative

of the companies to testify at the trial. This was not done. Mr. Krug's testimony regarding his conversation with the President of Montana Power referred to the indefinite phrase "alternative cost," and there is no suggestion that a price of 8.55 mills was even discussed.

While it is clear that the power produced would have an additional value because of the peaking capacity of Yellowtail and that this value must inure to the benefit of the Crow Tribe in determining just compensation for the dam site, there is no proof which would warrant this court in assuming that such power could be sold at an average cost of 8.55 mills per kilowatt hour.¹⁸

Plaintiff argues that the Patterson and Tower analyses and valuations disregard the non-power benefits of the dam and assume that "the power producing dam, which inevitably confers other benefits, is as limited in its functions as the steam plant." While Jones and Krug considered other benefits in their ultimate opinion of value, they did not attempt any specific segregation, and proof is lacking as to any

18. There is no evidence of any sales of power in the region at 8.55 mills. There is evidence of sales by Montana Power Company at rates ranging from 4.6 mills to 6.6 mills and sales by other utilities at various rates up to 7.5 mills, with most sales, however, substantially below that rate.

precise figures which may be attributed to specific benefits.¹⁹

With reference to benefits in addition to power generation, Krug testified:

“A. The Yellowtail project is being constructed for multi-purpose operations and will provide substantial benefits for irrigation, flood control, siltation control, river level control, additional power generation at downstream projects and other purposes. The federal government has been following the policy of collecting nominal amounts or nothing whatsoever for these various benefits, but that does not make them any less real. It is a difficult matter, however, to assign a specific economic measure to these benefits. To be conservative in this case, I have not assigned to them any weight in reaching my judgment as to the value of the Crow Tribal lands taken for the damsite and reservoir.” (Direct Testimony of Krug, p. 13.)

Krug called attention also to the fact that the project will provide recreational attractions as soon as the reservoir is filled.²⁰

19. This was recognized by plaintiff in its pretrial brief (p. 14); “We by no means suggest that an expert, however competent, should undertake to assign a specific money sum to each element of economic value, and then aggregate their sums. . . . Rather, competent experts should be permitted to express an over-all opinion on value after taking into account all relevant factors . . .”

20. Jones testified in pertinent part: “A. . . . Yellowtail is designed as a multi-purpose project to provide for flood control, irrigation, recreation, improvement of fish and wildlife habitat, and others. Some of these other benefits are obtained, in part, at the expense of the production of electric energy. . . . In other words, if Yellowtail Dam and reservoir were operated solely in order to maximize power production, the output would be greater than is currently estimated from the Bureau’s multi-purpose project and reflected in the Bureau’s estimate of power benefits.” (Direct Testimony of Jones, p. 64.)

In view of the lack of testimony as to precise segregated values on non-power benefits, it seems advisable to quote from the Definite Plan Report, with particular reference to irrigation and recreational benefits. On irrigation benefits the Report reads in part:

“The (Yellowtail) Unit is virtually indispensable to development of the Hardin Unit for the irrigation of more than 44,000 acres of new land, as well as numerous proposed pumping units dependent upon a source of low-cost power. In addition to providing such power for many of the 28 pumping Units of the Missouri River Basin Project remaining to be developed along the Yellowstone River, the water supply for 20 of these Units lying below the mouth of the Big Horn River will be improved by the effect of stream flow regulation and silt retention at Yellowtail. Any appreciable future increase in irrigation along the lower reaches of the Yellowstone River will be dependent upon upstream storage, a portion of which will be provided at Yellowtail, to prevent river stages from falling below diversion inlets in periods of low flow.”
(Vol. I at p. 1)

* * *

“A number of desirable irrigation pumping units along the Yellowstone, Tongue, and Powder Rivers cannot be undertaken without such a source of power, as the practical limit on transmission distance from the Fort Peck Project has been reached in this area. Several pumping units along the Big Horn River in northern Wyoming will also be dependent upon Yellowtail power when the output of the Boysen Power Plant is absorbed by its closer markets. Irrigable areas thus involved along the four streams total more than 180,000 acres.”
(p. 2)

* * *

“Thousands of acres of excellent land lie close to the river, which has an abundant annual supply of water. With storage regulation this land can be irrigated and made more productive and virtually free from the threat of drought.*** Hydroelectric power is needed for irrigation pumping, domestic, industrial, and municipal uses, and the necessary storage regulation can readily be used or augmented to provide for needed flood control, silt retention, improvement of fish and wildlife resources, and recreational opportunities.” (p. 11)

* * *

“From the standpoint of physical resources, Hardin Unit lands constitute one of the largest and best areas remaining available for irrigation development in the Missouri River Basin. Soils are alluvial, deep, properly permeable, friable, generally underlain by gravel, and have good productive capacity. Leveling requirements will be moderate and surface and subsurface drainage conditions are generally good.” (p. 48)

The parties have stipulated (par. 15) that, “Yellow-tail Dam and Reservoir will make possible irrigation downstream therefrom”; and that “The physically-associated irrigation project *** will irrigate about 45,800 acres of bench land just downstream from the dam ***.” The stipulation continues; “The basic concepts followed in the financial evaluation of the Yellow-tail development, as at all other developments which are a part of the Missouri River Basin Project, has been that each hydroelectric unit will contribute to the development of irrigation (pumping) equally, by associating a portion of the installed capacity in each generating unit with peak demand of irrigation pump-

ing power requirements, at the generator, in the proportion that the estimated maximum irrigation pumping power demand in the Basin relates to the ultimate installed generating capacity with full development of the natural resources as contemplated at the time in question. In 1959, this relationship resulted in some 22 percent of the installed generating capacity being associated with irrigation pumping demand requirements.”

The Definite Plan Report contains the following reference to recreational benefits:

“The proposed Yellowtail Reservoir, because of its outstanding scenic character and excellent fishing potentialities, is expected to influence a sizeable area in southern Montana and northern Wyoming. It should also attract a considerable number of tourists passing on U. S. Highway 10, 310, and 87, and Wyoming State Highway 14.

* * *

“The total expected annual use from outside the local zone has been estimated at 25,000 visitors.”
(p. 82)

“Tangible primary benefits would accrue from the direct sale of commodities, food, equipment and clothing, and from services such as transportation, employment of guides, and provisions for shelter and lodging. Less tangible but nonetheless valuable benefits would accrue from certain revenues from increased taxes in higher land values, licenses, leases, and similar items. Monetary eva-

luation of recreational benefits is difficult, however, if not impossible.” (p. 83)²¹

The Government conceded in its pretrial brief that if dam site value may be considered at all, values which may arise from the use and availability of the Yellowtail site “for power production, irrigation, domestic water supply and recreation” may be considered to the extent that these values are based upon values which a private developer could realize. The Government contends, however, that plaintiff is not entitled to compensation for any values arising from flood control, navigation, silt control and similar values cre-

21. During the time the court has been working on this opinion there have been numerous news stories relative to the proposed development of an extensive recreational area at the Yellowtail Dam and Reservoir site. For example, a news dispatch from Washington on August 15, 1963, reads in part:

“The proposed Big Horn Canyon National Recreation Area at the Yellowtail Dam and reservoir site would cost the federal government \$7.7 million, but might yield as much as \$1 million annually in benefits.

“The legislation would set aside 63,287 acres along the Big Horn River above Yellowtail Dam. It would include the Big Horn Canyon, 47 miles long with cliffs rising 800 to 2,000 feet. It would cover about a third of the 195-mile shoreline of Yellowtail Reservoir.”

While this is hearsay, it is impossible for the court to ignore completely the highly publicized value of the site for recreational purposes. Moreover, defendant’s brief on navigability (footnote 93) invites judicial notice “to the experience at Hoover Dam where a great new recreational industry has been built as the result of the dam construction.”

ated by the Government's demand.²² There is merit in the Government's position.

As counsel for plaintiff suggest in their post trial brief (p. 2), the "value" of lands of the special character here involved must be determined on the basis of the opinions of experts, and the "expert's ultimate opinion is to be weighed and evaluated *** in the light of his qualifications, the reasonableness of his methods, and the quality of the logic with which he supported his opinion." I agree. I consider all of the expert witnesses here well qualified. Unfortunately, however, I cannot accept in their entirety the conclusions of any one expert. Nor is this the type of case where it is possible to modify specific estimates of costs, values and other factors considered by the experts and arrive at specific findings accordingly. There are too many interrelated, complicated, intangible and uncertain factors of value and too many methods of using those factors.²³ All the court can do is evaluate as fully and fairly as possible both the stipulated

22. Counsel for plaintiff contend that flood control may serve "as the basis for reimbursement from the Government in accordance with proclaimed national policy." (Reply Brief, p. 16.) Jones testified regarding three instances where non-federal public agencies were reimbursed for flood control benefits and Patterson was familiar with one such case. On the other hand, Tower testified that some license projects have to bear these burdens without recompense. I cannot find that plaintiff has shown an established national policy of reimbursement for flood control benefits.

23. Plaintiff suggests in its reply brief (p. 15) that, "The re-analysis of all the hundreds of assumptions, explicitly and implicitly made by the witnesses, is beyond the legitimate scope of a reply brief." It is likewise beyond the scope of the court's opinion.

facts and the expert opinions and arrive at its own "informed guess" of the fair market value of the property taken.

The market value "may be deemed to be the sum which, considering all the circumstances, could have been obtained for (the property); that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." While the court may not indulge in "mere speculation or conjecture," the determination must "be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."²⁴

In establishing value in Indian Claims Commission cases,²⁵ neither the Commission nor the courts have attempted to allocate acreage or total valuations among the various factors considered.²⁶ Defendant contends that those cases are inapplicable since awards under the Indian Claims Commission Act are not made on the

24. *Olson v. United States*, 1934, 292 U.S. 246, 255-57, 54 S. Ct. 704, 78 L. Ed. 1236. See also *Kimball Laundry Co. v. United States*, *supra*; *United States v. Miller*, 1943, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336; *Mississippi & Rum River Boom Co. v. Patterson*, 1879, 98 U.S. 403, 25 L. Ed. 206, 208.

25. Claims arising under the Indian Claims Commission Act of 1946, 25 U.S.C. §70, *et seq.*

26. See, for example: *Rogue River Tribe of Indians v. United States*, Ct. Cl. 1950, 89 F. Supp. 798, 803-07; *Alcea Band of Tillamooks v. United States*, Ct. Cl. 1950, 87 F. Supp. 938, reversed as to interest, 341 U.S. 48, 71 S. Ct. 552, 95 L. Ed. 738; *Otoe and Missouri Tribe of Indians v. United States*, Ct. Cl. 1955, 131 F. Supp. 265, 290.

basis of "just compensation," as the Act refers instead to the "quantum of relief." The courts and Commission in the Indian Claims Commission cases, however, as here, were confronted with the difficulty of segregating values. Accordingly, they simply arrived at a dollar per acre or total figure which fairly considered all factors deemed relevant. I conclude that the same practice is justified in this case, provided the values are limited to those which a non-governmental developer might reasonably expect to realize from the development of the site.

This case is unique in that there is a public record of past negotiations between the parties. These negotiations were expressly referred to in both the House and Senate discussions of the Conference Report on S.J.R. 12, which became Public Law 85-523.²⁷

Long prior to the enactment of Public Law 85-523, Congress and its committees were concerned with the problem of compensating the Crow Tribe for the lands acquired. For many years the Department of the Interior, through its Bureau of Reclamation, negotiated with representatives of the Crow Tribe. The results of these negotiations were reported to the Senate Committee on Interior and Insular Affairs at a hearing on December 9, 1955. At that hearing the committee chair-

27. The history of the negotiations, legislation, and litigation relating to compensation of the Crow Tribe was set forth in detail in the House by Congressman Haley, one of the House Conferees, and Congressmen Metcalf and Anderson of Montana. See 104 Cong. Rec., pp. 12975 to 12980.

man expressed the concern of Congress that "the Crow Indian Tribe * * * receive full and just compensation for rights-of-way needed for Yellowtail Dam and Reservoir" and the committee's regret that "negotiations did not proceed to the point where an agreement could be reached."²⁸

S. J. Res. 135 passed by the 84th Congress, 2d Sess., provided for a payment of \$5,000,000 (after passing the Senate for this amount, reduced in the House to \$1,500,000, and amended to the Senate figure by the Conference Report). As noted supra, this bill was vetoed by the President on June 6, 1956 (see footnote 3). The report to the Senate accompanying S. J. Res. 135 (Report No. 1626) recited that the Crow Indian Tribal Council on January 11, 1956, upon the recommendation of its consulting engineer, had adopted a resolution offering to accept \$5,000,000 for its con-

28. It appeared from a report of Wilbur A. Doxheimer, Commissioner of the Bureau of Reclamation, that a 15 man special committee of the Tribe had recommended that the "Crow Tribe accept \$5 million for outright sale of the right-of-way lands" or that they "grant a 60 year lease at an annual charge of \$150,000." The Regional Director of the Bureau had advised the committee that the Bureau would prefer a lump sum payment, and that some basis would be necessary to justify a \$5 million payment. He pointed out that the Bureau, in 1951, arrived at a figure of \$1½ million. This allowed the Indians, for tribal lands, one-third of the power site value and allowed two-thirds of the power site value for private and public interest lands. The Regional Director proposed a three man appraisal board, which the negotiating committee approved. At subsequent meetings of the Crow Tribal Council, however, the recommendations of the committee were rejected and a resolution adopted asking for an annual rental of \$1 million for a 50 year period. (Report of Hearing on Yellowtail Dam — Hardin Unit, Montana before the Committee on Interior and Insular Affairs, U.S. Senate, December 9, 1953, Part 2.)

sent to the transfer of the right-of-way for the dam and reservoir. The Department of the Interior and Bureau of the Budget had approved the sum of \$1,500,000. The Senate committee based its conclusion that a \$5,000,000 payment was justified in part upon a comparison with the rental payments made for Kerr Dam.

The Senate version of S.J.R. 12 provided for a payment of \$5,000,000. The House reduced that amount to \$2,500,000. The Conference Committee Report, which was "intended to include both just compensation for the transfer * * * of all right, title, and interest of the Crow Tribe in and to the Tribal lands * * * and a share of the special value to the United States of said lands for utilization in connection with its authorized Missouri River Basin project, in addition to other justifiable considerations." The Act further provided that in any suit brought for an additional sum, "no amount in excess of the sum above stated shall be awarded unless the court finds that the whole of said sum is less than just compensation for all of the tribal right, title, and interest taken."

In a statement to the Senate explaining the Conference Report, Senator Mansfield, speaking for himself and Senator Murray, said in part:

"The provisions of Senate Joint Resolution 12 as reported from the conference appear to be the most reasonable solution possible to the difficulties surrounding the transfer for the title of these

Indian lands. I have always felt and continue to feel that the Crow Indians deserve a settlement of at least \$5 million. This was the figure agreed to by the tribal council, approved by the Senate last year and endorsed by the Congress in the 84th Congress. In addition there is ample support for such a payment based on engineering and legal data.

* * *

“However, to insure that the settlement can be made expeditiously, a compromise payment of \$2,500,000 to the Crow Indian Tribe has been agreed to by the conference. The provisions of Senate Joint Resolution 12 set this payment as the floor and the Crow Tribe may appeal to the court of claims of the district court in Montana for additional compensation based on power site values, not now considered in the payment. I feel that the courts will have an obligation to award the tribe additional compensation based on the recent court decision handed down by Judge William Jameson in the Montana District Court.²⁹

* * *

“The Crow Indians, as do all Indians, constitute a special case, well established in our laws. The provisions of Senate Joint Resolution 12 give the Crow Tribe a sound base for settlement and allows them to appeal to the courts for additional compensation. The passage of this joint resolution will

29. Referring to United States v. 5,677.94 acres of land, etc., 1958, 162 F. Supp. 108.

assure the Indians that they have this additional course of action." (104 Cong. Rec., p. 13006.) ³⁰

While the past negotiations and the concern of Congress that the Crow Tribe be fully compensated are not evidence of value in determining the amount of just compensation, they cannot be overlooked entirely in a case of this nature, involving, as it does, so many intangible factors and express and implied promises and assurances to the plaintiff tribe.

As an additional reason why power site value should not be considered, the Government argues that the plaintiff does not own a sufficient portion of the site to accommodate the location of a power project.³¹ It is undisputed, however, that the dam, powerhouse and switchyard are all located on the lands acquired from

30. In the House, Congressman Anderson said in part: "... I am disappointed that this legislation does not provide more than \$2½ million as an initial payment to the Crow Indians for this dam site. Two different engineers who appraised this site for the Government said it was worth more than \$4½ million. Mr. Barry Dibble, an engineer who appraised the site for the Crow Tribe, reported that it was worth \$5 million. I think we might well have accepted the Senate figure of \$5 million in full settlement, since the Crow Tribe has indicated that they regard this as a fair figure." (104 Cong. Rec., p. 12980.)

31. As quoted *supra*, (footnote 12) the Crow Allotment Act provided that lands "chiefly valuable for the development of water power shall be reserved from allotment or other disposition for the benefit of the Crow Tribe of Indians." Presumably the United States determined what lands should be reserved. It seems probable that some of the allotted Indian lands and possibly some of the private lands within the taking area were a part of the Reservation at the time of the enactment of the Crow Allotment Act, but this cannot be determined from the record.

plaintiff. In its pretrial brief (p. 33) plaintiff argued that the "Crow Tribe alone holds the unavoidably necessary lands, and whether any other lands would ever be utilized is too remote or speculative to attribute any dam site or water power value to them." On the other hand, defendant contended that plaintiff owns but 20 percent of the land required for the Government's dam and reservoir project and that "the value of the Indians' interest in the Yellowtail dam and reservoir site cannot be based on the value of a dam which will flow five times the area of the land owned by plaintiff," but "must be based on a dam which will flow only the area owned by the plaintiff." (Defendant's pretrial brief, p. 21.)

As set forth in the court's pretrial memorandum, only the lands of the Crow Tribe are encompassed by the Crow Allotment Act. Other landowners may not claim water power value in determining the fair market value of their lands. A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, presumably would be willing to pay dam site or water power value to the Crows for a dam impounding water over the entire area, less the cost of necessary acquisitions of non-Crow lands at

their fair market value, which would not include water power value.³²

As noted *supra* (footnote 10), in computing net benefits Tower computed the Crow's proportionate share at 31.3 percent to 37.7 percent in arriving at site values of \$1,280,000 to \$1,540,000. Patterson testified in rebuttal (Tr. p. 599) that the Crow Tribe should receive only an 18 percent share since the lands in question represent 18 percent of the total taking area. On the other hand, Jones testified that it would be reasonable to award the Crow Tribe 60 percent as the percentage of the Yellowtail Reservoir actually stored on Crow-contributed lands. Plaintiff argues the Government is taking extensive additional land for such purposes as flood control and recreation and that all of this land is not needed for a single purpose power project.

Again, I cannot agree completely with any of the experts, although I think Dr. Jones' approach is more

32. Roger J. Theusen, defendant's appraiser, estimated the costs of acquiring reservoir lands not owned by the Crow Tribe, as follows:

Market value of private lands	\$ 966,000
Market value of state lands	51,000
Market value of allotted Indian lands	18,500
Capitalized rental value of public lands	504,340
Acquisition costs	67,500
Funds to cover condemnations	246,000

Total	\$1,853,340
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(p. 13, Statements of defendant's witnesses.)

He estimated a "holdup" value of \$3,737,340 if the acquiring agency did not have the right of eminent domain, particularly if the "acquiring agency had paid \$2,500,000 for some 6,000 acres of inaccessible mountain land" (p. 14)

nearly correct. It seems obviously unfair to use Patterson's 18 percent, particularly in view of the fact that he made no allowance for any of the so-called collateral benefits, and I must conclude that Tower's estimates of 31 percent to 37 percent are too low. On the other hand, if development for recreation is taken into consideration in awarding just compensation, more land would be required than for a single purpose power project. It would be necessary accordingly to discount Jones' estimate of 60 percent.

It is impossible to arrive at an exact figure, but consideration must be given to recreation benefits with respect to both land required and the award of just compensation to the Crow Tribe. In addition, consideration must be given to the fact that the dam, powerhouse and switchyard are all being constructed on Crow lands and that these lands are the only lands for which water power value may be allowed.

There remains for consideration the question of whether the Big Horn River is navigable. Although not necessary to the decision in view of my conclusion that water power value may be considered in determining just compensation, it is advisable to rule upon this question in the event a higher court should determine that my conclusions with reference to just compensation are erroneous.

The Government contends that the river is navigable at the site of the Yellowtail project; the plaintiff con-

tends that it is not. The burden of persuasion rests with the party urging navigability. *Harrison v. Fite*, 8 Cir. 1906, 148 F. 781, 785.

The Wind and Popo Agie Rivers originate in Wyoming. At their confluence, near Riverton, Wyoming, they form the Big Horn River. This river flows northward, crosses the Wyoming-Montana line, and eventually flows into the Yellowstone River, which in turn flows into the Missouri River. A short distance north of the Wyoming-Montana line the Big Horn River enters the Lower Big Horn Canyon. It is within this canyon that the Yellowtail project is under construction.

The parties have presented excellent and exhaustive historical analyses of the uses which have been made of the Big Horn River. There is little disagreement as to the historical facts. It is agreed that in 1825, under General Ashley, fur trappers used the river to transport their furs to St. Louis. The parties disagree on whether the point of embarkation of the trappers was upstream or downstream from the Lower Big Horn Canyon. The plaintiff contends that the evidence shows the trappers took to the river after crossing the Big Horn Mountains — after they were already to the north and downstream side of the canyon. The Government argues that the point of embarkation was on the south side of the Big Horn Mountains and upstream from the canyon; in other words, that the trappers

in effect "shot the rapids" through the Lower Big Horn Canyon.

Reference is made by both parties to alleged usage of the river by other trappers, again with disagreement as to the point of embarkation. The parties do agree that in 1858, three men went down the river through the canyon. The parties agree that steamboats penetrated as far up the Big Horn River as the site of the present town of Hardin, on the downstream or north end of the Big Horn Canyon.

Plaintiff relies primarily on difficulty of navigation as the basis for its claim of non-navigability. It introduced evidence concerning the length of time the river is frozen over during the winter, evidence of ice jams, and affidavits concerning the heavy silt content of the river, with consequent rapid build up of sand bars. Further evidence was presented as to the rapids, boulders, etc. which make it difficult to traverse the river through the canyon itself, as well as evidence of the lack of a need for navigation on the river.

The Government submitted affidavits which compared the depth of the river, its average flow and average gradient with certain other rivers which have been held navigable, demonstrating that the Big Horn compares favorably with such rivers as far as physical characteristics are concerned.

A qualified hydrologist, in an affidavit received in evidence, expressed his opinion that the river could, with relatively little cost and work, be made navigable both up and downstream by removal of some 150 boulders and by building some small locks. There was further evidence of many persons who have "shot the rapids" through the canyon in recent years, testifying to the easy passage and pleasant voyage.

There is no way to reconcile the opinions of the various persons whose affidavits were taken. In the opinion of oldtimers the river is treacherous and dangerous, and navigating it through the canyon is fraught with danger. Furthermore, the heavy silt content builds up sand bars so rapidly that channels change, causing further navigation problems. On the other hand, the affidavits of weekend pleasure seekers who traveled down the river in all manner of boats testify to the easy and pleasant passage which the trip allows.

In any event, it is clear from the evidence that the river could be made navigable. Although for certain parts of the year it might be impassable because of ice, it is well settled that this fact alone will not prevent navigability; nor will the presence of sand bars. *U.S. v. Appalachian Power Co.*, 1940, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243; *Economy Light & Power Co. v. United States*, 1921, 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847. Thus in the Appalachian case it was said in 311 U.S. at 408-409: "There has never been doubt

that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." And in the *Economy Light & Power* case, in 256 U.S. at 122 the Court said: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

The physical characteristics of the river do not prevent its classification as navigable. Especially is this true in view of the holding in the *Appalachian* case that the river need not be navigable in its natural or unimproved state. Thus it was said that:

"To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural

or improved condition' are used or suitable for use." (311 U.S. at 407.) ³³

It is true, as plaintiff contends, that the *Appalachian* case recognized that there are "obvious limits to such improvements as affecting navigability," and that, "There must be a balance between cost and need at a time when the improvement would be useful." (311 U.S. at 407-8). On the other hand, the Court said further: "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. * * * Nor is lack of commercial traffic a bar to a conclusion of navigability *where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.*" (Emphasis added.) (311 U.S. at 416.) ³⁴

33. The district court had found that the river was not in fact navigable. The court of appeals affirmed. It was recognized that the opinions of the lower courts were in accord with prior rulings of the Supreme Court on the basic concept of navigability, including *The Daniel Ball*, 10 Wall. 557. In a dissenting opinion, Mr. Justice Roberts said in part: "But further the court holds, contrary to all that has heretofore been said on the subject, that the natural and ordinary condition of the stream, however impassable it may be without improvement, means that if, by 'reasonable' improvement, the stream may be rendered navigable then it is navigable without such improvement; that 'there must be a balance between cost and need at a time when the improvement would be useful.' . . . If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or channelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable because, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream." (311 U.S. at 433.)

34. See also *United States v. Utah*, 1931, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844; *Montana Power Co. v. Federal Power Commission*, D.C. Cir. 1950, 185 F. 2d 491, 494-95; *United States v. Wallace*, D. Ida. 1957, 157 F. Supp. 931.

On the basis of the *Appalachian* case, I cannot escape the conclusion that the Big Horn must be deemed a navigable river.

In arriving at the amount of just compensation to which plaintiff is entitled, I am taking into consideration all of the expert testimony, all of the stipulated facts and exhibits received in evidence, and all of the factors hereinabove set forth. In particular:

1. I cannot accept in its entirety the opinion of any of the expert witnesses for either party, and I find that each opinion is subject in part to the objections and criticism expressed by the adverse witnesses.

2. The lands acquired by defendant from plaintiff are very well adapted for the construction of a hydroelectric dam and have long been recognized as a potential dam site. In the Crow Allotment Act of 1920 Congress specifically provided that tribal lands chiefly valuable for the development of water power should be reserved from allotment or other disposition for the benefit of the Crow Tribe.

3. Defendant is constructing a multi-purpose dam designed to "provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal-industrial water and other benefits."

4. (a) The dam, powerhouse and switchyard for Yellowtail dam and reservoir are all being constructed

on the lands acquired from plaintiff; (b) in awarding just compensation the Crow Tribe is entitled to dam site or water power value, whereas this is not true of other lands acquired for the dam and reservoir; (c) in computing "net benefits" and arriving at an award of just compensation for plaintiff's lands, plaintiff is entitled to substantially more than an amount based solely on the percentage of the total taking area represented by the plaintiff's lands.

5. Congress many times has manifested its intent that the Crow Tribe receive full and just compensation for the lands acquired. The results of extensive negotiations with the Crow Tribe by the Department of the Interior, through its Bureau of Reclamation, have been reported to Congressional committees, and by the committees to Congress.

6. Both Congress and the Department of the Interior have recognized the dual role of the Department as trustee of the Indian wards and as representative of the defendant in acquiring the tribal lands. In the rental of private utilities of power sites owned by other Indian tribes (the Warm Springs and Flathead tribes), the Department has been zealous in requiring payment of full rental value for the sites. The Crow Tribe is entitled to the same consideration in the acquisition by the defendant of its power site.

7. By reason of dissimilarities between the present acquisition and rental of the Warm Springs and Flat-

head sites, the testimony of all the expert witnesses with respect to value based on a comparison with the rental agreements for those sites is of limited value, but has been considered with all the evidence in arriving at the amount of just compensation.

8. The plaintiff has failed to show that as of July 15, 1958, or today, there was any single purpose power project, or that any private utility was interested in doing so.

9. While there is a market for the power which will be produced from Yellowtail Dam, and private utilities would purchase this power at their "best alternative cost," plaintiff has failed to show that any private utility would pay an average of 8.5 mills for the power.

10. It now appears that the dam will have a generating capacity of 250,000 kw instead of 200,000 kw, and this results in some increase in site value.

11. The dam is being constructed primarily as a peaking plant, and its peaking capacity renders the power more valuable, perhaps by as much as 10 percent, than power from a comparable steam electric plant.

12. In addition to power, substantial benefits will accrue from increased irrigation and the development of recreational areas. By reason of the inter-

relation of allocation of both costs and benefits, the precise value of these benefits cannot be segregated from the power benefits.

13. In awarding just compensation, values which arise from the use and availability of the Yellowtail site for irrigation and recreation, as well as power production, may be considered to the extent that they could be realized by any private developer of the site. Plaintiff is not entitled to an award based on flood control, navigation, silt control and similar values created solely by defendant's demand.

14. Giving consideration to all of the factors herein discussed and all of the evidence, I find that the amount of just compensation for all of the tribal right, title and interest taken is \$4,500,000, and that plaintiff is entitled to judgment in the sum of \$2,000,000, with interest from the date the lands were transferred to the defendant.

Counsel for plaintiff will prepare, serve and lodge form of judgment pursuant to Rule 11(b) of the Local Rules of Court.

Done and dated this 1st day of October, 1963.

W. J. JAMESON
United States District Judge

United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE
COUNTY, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.
CITY OF SEATTLE, *Appellant*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE
COUNTY, *Appellee*.

FEB 7 1967

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

FINAL BRIEF OF CITY OF SEATTLE
AS APPELLANT

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Corporation Counsel
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FILED

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United States Court of Appeals
For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE
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United States Court of Appeals For the Ninth Circuit

PUBLIC UTILITY DISTRICT NO. 1 OF
PEND OREILLE COUNTY, *Appellant,*

vs.

CITY OF SEATTLE, *Appellee.*
CITY OF SEATTLE, *Appellant,*

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF
PEND OREILLE COUNTY, *Appellee.*

No. 20196

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

FINAL BRIEF OF CITY OF SEATTLE AS APPELLANT

The City's argument in support of its appeal is included as Part Two (P. 62-79) of its Combined Brief. In that argument we set forth two points. First, we pointed out that the navigation servitude doctrine applies to all lands lying below ordinary high water. The P.U.D. concedes this point (P.U.D. Final Br. 54). Second, we asserted that Seattle is vested in these Section 21 proceedings with the navigation servitude right. The P.U.D. has not joined this issue. It ignores the cases principally discussed by us, such as *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359 (1948). Instead, it raises a

counterissue — that the rights in question are rights in *water*, not in land, and are protected by Section 27 of the Power Act. Before analyzing this theory, we shall review the basis of the servitude doctrine.

In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 627-628 (1961), the Supreme Court set forth a clear explanation of the doctrine:

“ ‘This navigational servitude — sometimes referred to as a ‘dominant servitude,’ *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 [74 S.Ct. 487, 493, 98 L.Ed. 686], or a superior navigation easement,’ *United States v. Grand River Dam Authority*, 363 U.S. 229, 231 [80 S.Ct. 1134, 1136, 4 L.Ed2d 1186]—is a privilege to appropriate without compensation which attaches to the exercise of the ‘power of the government to control and regulate navigable waters in the interest of commerce.’ *United States v. Commodore Park*, 324 U.S. 386, 390 [65 S.Ct. 803, 805, 89 L.Ed 1017]. The power ‘is a dominant one which can be asserted to the exclusion of any competing or conflicting one.’ *United States v. Twin City Power Co.*, 350 U.S. 222, 224-225 [76 S.Ct. 259, 260-261, 100 L.Ed 240]; *United States v. Willow River Power Co.*, 324 U.S. 499, 510 [65 S.Ct. 761, 767, 89 L.Ed. 1101]. A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court’s opinion in *United States v. Chicago, M., St. P. & P. R. Co.*: [312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064].

“ ‘The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The

damage sustained results not from a taking of the riparian owner's property in the stream bed, but from lawful exercise of a power to which that property has always been subject.' 312 U.S. 592, 596-597 [61 S.Ct. 772, 775, 85 L.Ed. 1064].'"

It thus appears that the easement attaches to the exercise of the power to control and regulate commerce. Issuance of a license to Seattle by the Federal Power Commission was a delegation of the right to exercise that power. These Section 21 proceedings are an actual exercise of that right by Seattle, as licensee and agent of the Federal Government. The taking of the P.U.D.'s land interests lying below ordinary high water is a lawful exercise of a power to which the lands had always been subject. It is not, as the P.U.D. asserts, an attempt to strip the P.U.D. of property without "just" compensation (P.U.D. Final Br. p. 70-71). The P.U.D. and its predecessors always held these rights subject to the possibility that the Federal Government might one day exercise its power to control or regulate commerce in this stretch of the Pend Oreille, and that if the Government did not develop the river itself, it might select some instrumentality other than the P.U.D. to do so.

The P.U.D.'s principal argument is that this power or servitude would not, in any event, apply to its property interests since they were vested water rights. Somewhat the same issue inheres in the P.U.D.'s appeal, as it relates to one phase of the testimony of Mr. Courtney (See Seattle Combined Br. p. 47-49). As we pointed

out in our Combined Brief. Section 27 relates only to the "control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." The simple and complete answer to the P.U.D.'s argument is that the P.U.D. never had any such vested rights.

The P.U.D. argues first that R.C.W. 54.16.050 which provides that a Public Utility District "may occupy and use the beds and shores up to the high water mark of any . . . lake, river, or watercourse," gives it some such vested right (P.U.D. Final Br. p. 4). But R.C.W. 54.16.050 by its terms merely gives a public utility district the power to acquire the right to use the bed of a river in connection with a structure for "storing, retaining, and distributing water." The P.U.D. never acquired any such right. Furthermore, the P.U.D. confuses, as it also does in construing Chapter 125 of the Laws of 1907 (Text is set out in Appendix to Opening Br. of P.U.D., p. 99), the right to occupy lands with the right to appropriate water. Chapter 125 gives applicants to the state, upon approval, the right to "overflow any such [state] land and inundate the same . . ." This was the right held by the P.U.D. as Parcel 3, easement over shorelands (See Seattle's Combined Br. p. 8).

The P.U.D.'s interpretation of Chapter 125 and of its easement, confuses a right to use state land with a right to use the waters of the Pend Oreille River. The distinction may be illustrated by an analogy. An easement

by the owner of a field to someone to run sheep in a pasture does not give the grantee any right to any sheep. The sheep must be acquired separately. Section 27 of the Power Act by its terms relates only to vested rights in water. It does not purport to affect easements to store water on shorelands.

Neither the P.U.D. nor any predecessor of the P.U.D. ever acquired any state water right. Even if it be assumed, contrary to the law,^o that the P.U.D. or its predecessor had some right in the navigable waters of the Pend Oreille River by virtue of its ownership of uplands and/or shorelands, such right would be dependent upon beneficial use. This court stated in regard to non-navigable waters in *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897, 904 (9th Cir. 1964):

“For the purpose of our decision, it is of no consequence whether the rights which are for adjudication here are appropriative rights or riparian rights. The settled law in the State of Washington is that riparian rights, their existence and continuation, are, like appropriative rights, dependent upon beneficial use.”

Also see statements in footnote 5 at 330 F.2d 905.

The distinction between appropriative and riparian water rights was stated in *Wallace v. Weitman*, 52 Wn.2d 585, 588, 328 P.2d 157 (1958):

“A right of *appropriation* is a right to a definite quantity of water. A riparian right is not a right to

^oSee *Seattle Combined Br.*, p. 48.

a specific *quantity* of water. It is the right to have the stream flow to and over the riparian land *as it is wont to do by nature* for the use of the owner.” (Emphasis added to last two lines)

Thus, even assuming the P.U.D. had some sort of riparian right to use the waters of the Pend Oreille River, it would not follow that the P.U.D. could have, without more, appropriated any of the waters of the Pend Oreille River. It is certain that the P.U.D. could not have stored the Pend Oreille River in a reservoir and could not have diverted the river through penstocks into a powerhouse. Whatever the rights attaching to a riparian on a great navigable stream such as the Pend Oreille, they do not extend to damming and diverting its entire flow.

The P.U.D. next takes the position that CXLII of the Session Laws of 1891 (p. 327) did not purport to cover appropriation of water for power purposes (P.U.D. Final Br. p. 35-36), but was limited to “use of water for irrigation, mining and manufacturing purposes.” This is incorrect. The law of 1891 covered not only irrigation, mining and manufacturing, but appropriations “for supplying cities, towns or villages with water, and for the use of water works.” Use of the generic term “water works” manifested a legislative intent to have the act apply to water works constructed for any purpose, including generation of power.

Even if the P.U.D.’s contention that the 1891 Act did

not purport to cover appropriation of water for power purposes were accepted, the P.U.D.'s assertion that it owned vested *water* rights would still fail. In an article entitled, *Riparian and Public Rights to Lakes and Streams* (1960) 35 Wash. L. Rev. 580, Professor Ralph W. Johnson reviewed the relationship between the riparian and appropriation systems in Washington. In so doing, he discussed the circumstances under which riparian rights might be held to be vested as of the passage of the 1917 Water Code:

"It has often been said that riparian rights are not gained by use, nor lost by disuse and that they are not merely appurtenances but are part and parcel of the land. Thus it could be urged that the 1917 code had no effect upon any of those rights, including the right to irrigate, because they all "existed" prior to the code and were preserved by its saving clause even though they had not yet been exercised. Strangely, the cases in this state have not yet clearly answered this question, although the executive branch has taken a definite stand on it. The supreme court opinion that sheds the most light here is *Brown v. Chase*. [125 Wash. 542, 217 Pac. 23 (1923)] Certain riparians on the Wenatchee River sought to block the issuance of an appropriation permit to nonriparian defendants. The permit would have allowed temporary storage of the water each year in Lake Wenatchee for release during the irrigation season. Although the riparians could show no harm to their lands either presently or prospectively they nevertheless contended they had a legal right to bar the appropriation. The court declined to agree, stating "Waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with riparian lands, are

subject to appropriation for use on nonriparian lands." Thus it would seem that in Washington the riparian right to appropriate water for use on riparian land is not always an "existing" right. If it were "existing" the court would have to hold that any appropriation that deprived one of this right could be made only upon the payment of "just compensation" to the riparian. It did not do so. Instead, it held that as against a conflicting prior appropriation under the code such a riparian right does not exist. *Does the Brown case also mean that if the riparian had not made his appropriation prior to June 6, 1917, and did not intend to do so within a reasonable time thereafter he is forever barred from taking such action?* It would seem so, although the opinion does not directly answer the question. Under *Brown v. Chase*, a riparian who on June 6, 1917, had not actually appropriated water for use on his land and did not intend to do so within a reasonable time thereafter could not be said to have an "existing" right as of the date of the code. His right to appropriate is actually "gained" by present or prospective use. Not having been in existence at the time of the code it could not have been saved by the savings clause.

"There is another reason why such a riparian right should not exist in this state. One of the basic purposes of the water code is to bring as much certainty as practicable to the ownership and control of water rights. If a riparian today could appropriate without proceeding through the code there would be no record of his appropriation in the state files, and the uncertainty already existing in this state by reason of pre-1917 riparian diversions would increase." ((1960) 35 Wash. L. Rev. 590-592).

In support of its argument that federal power licensees must compensate owners of state water rights as defined in Section 27 of the Act, the P.U.D. cites *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S.

239 (1953), (P.U.D. Final Br. p. 60-68). Involved in that case was the question whether water rights under state law to the use of a navigable river for power purposes were abolished by the Federal Power Act. By a narrow 4 to 3 majority, the Court held they were not within the navigation servitude doctrine. The *Niagara Mohawk* decision is totally irrelevant here, since the Court in its analysis was expressly considering *water* rights under state law, of which the P.U.D. has none.

The Court's conclusion in *Niagara Mohawk* was stated as follows:

"We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them." (347 U.S. at 248).

The Court of Appeals had held Section 27 to have "conclusive effect" (*Niagara Mohawk Power Corp. v. F.P.C.*, 202 F.2d 190, 205 (D.C. Cir. 1952)). It is apparent from the Supreme Court's reliance upon *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930) and *First Iowa Hydro-Electric Co-op v. F.P.C.*, 328 U.S. 152 (1946), both Section 27 cases, that the majority of the Court felt Section 27 to be controlling.

The complete contrast between the rights acquired from the P.U.D. in this case, and those involved in *Niagara Mohawk* may be demonstrated by the following excerpt from a footnote in the *Niagara Mohawk* opinion,

in which the Supreme Court refers to certain International Paper Company rights involved in that litigation:

“Recovery by the International Paper Company for the deprivation of its use of the instant water rights in 1917 was authorized by this Court in 1931. Referring to the 730 c. f. s. now before us, Mr. Justice Holmes said for the Court: “From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second, — a right that by the law of New York was a corporeal hereditament and real estate.” *International Paper Co. v. United States*, 282 US 399, 405, 75 L Ed 410, 413, 51 S Ct 176. The Government was obliged to pay for taking those diversionary rights by condemnation and they are the ones for which respondent is now paying an annual rental of \$99,000. The deprivation, therefore, was not an exercise of the Government’s dominant servitude, but was a compensable taking by condemnation of the paper company’s recognized right to use the water. “[T]he Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal.” *Id.* 282 US at 408.” (347 U.S. 247, Footnote 11).

While the Paper Company was entitled to draw and was drawing for power purposes 730 cubic feet per second from the Niagara, the P.U.D. had no right to draw and had never drawn a single c.f.s. from the Pend Oreille at any time for any purpose whatsoever.

In sum, the crucial distinction between *Niagara Mohawk* and the present action is that the City did not acquire any rights of the P.U.D. under state law to the use of waters of the Pend Oreille River. Rather, the

City acquired fee and easement rights in certain shorelands and fee in certain uplands. There can be no question under the cases cited by us in our Opening Brief as Appellant (Part II of Combined Br. p. 68-78) that this Section 21 condemnation is an exercise of the dominant servitude in the interests of navigation. Exercise of that right requires no compensation. While the United States Supreme Court has never had occasion to pass squarely on this issue, as it relates to the exercise of the right by a Federal Power Act licensee, the reference by the majority in *Grand River Dam Authority v. Grand Hydro*, 335 U.S. 359, 373 (quoted at p. 76 of our Combined Brief) to exercise of Section 21 rights by the "United States or by one of its licensees" suggests that the Court, consistent with its other opinions, would hold that the navigation servitude would preclude compensation to the P.U.D. for interests lying below the high water line and for water power value, if any, of the uplands. To hold otherwise would be to confer a wind-fall on the P.U.D. As the minority of four Justices wrote in the *Grand Hydro* case:

"The result of this decision, no matter how it is rationalized, is to give the water-power value of the current of a river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it. The United States has asserted through the Federal Power Act its exclusive dominion control over this water power. That Act specifies how one may acquire a license to exploit it, § 23(b), 16 USCA §817, 5 FCA title 16, § 817, and the conditions under which the licensee must operate. See

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 90 L. Ed 1143, 66 S. Ct. 906.

“Petitioner has such a license. Respondent has none and, for reasons unnecessary to relate here, concededly cannot obtain one. Respondent therefore has no claim to the water-power value which the law can recognize, if the policy of the Federal Power Act is to be respected . . .” (pp 375-76).

The decree below should be affirmed in all respects except that there should be excluded from the award any compensation for the P.U.D.'s shoreline interests.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By RICHARD S. WHITE
Of Counsel for City of Seattle
Appellee-Appellant

No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MFG. CORP., a California corporation,
Appellant,

vs.

MAX J. LUGASH and MAXON INDUSTRIES, INC., a California corporation,

Appellee-Cross Appellant,

vs.

SANTA ANITA MFG. CORP., a California corporation,
Cross Appellee.

FEB 7 1967

APPELLANTS' OPENING BRIEF.

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No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MFG. CORP., a California corporation,
Appellant,
vs.

MAX J. LUGASH and MAXON INDUSTRIES, INC., a California corporation,
Appellee-Cross Appellant,
vs.

SANTA ANITA MFG. CORP., a California corporation,
Cross Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal by defendant from portions of a final judgment granted by the United States District Court, for the Southern District of California, Central Division, holding claims 1, 2, 4, 8, 9 and 11 of Patent No. 2,837,227 valid and infringed and denying defendant's counterclaim for false marking (Vol. I, pp. 676-677). Jurisdiction of the trial court arose under the provisions of 28 U.S.C. §§1338(a) and 2201 and the patent laws of the United States. Jurisdiction to review the District Court's judgment by this court is conferred by 28 U.S.C. §1291.

STATEMENT OF THE CASE.

A. The Parties.

Appellant, Santa Anita Mfg. Corporation (the defendant below) is a California corporation having a regular and established place of business in Temple City, California where it has manufactured and sold load elevators for trucks known as the "Folda-Lift" hydraulic loaders.

Appellee, Max J. Lugash (one of two plaintiffs below) is an individual residing in California and the patentee of United States Letters Patents Nos. 2,837,227 entitled "Load Elevator for Motor Trucks" and 2,989,196 entitled "Hydraulic Hoist for Vehicles."*

Appellee, Maxon Industries, Inc. is a California corporation which is the owner of Lugash patents '227 and '196 and manufacturers and sells truck loaders known as "Tuk-A-Way" loaders.

B. The Controversy Raised by the Pleadings.

Defendant was charged with infringement of both Lugash patents '227 and '196 by a Complaint filed by the patentee (Vol. I, pp. 2-4). Defendant answered denying validity and infringement of the patents, asserted affirmative defenses and counterclaimed for a declaration of patent invalidity and non-infringement of both patents (Vol. I, pp. 5-13) to which the patentee replied (Vol. I, pp. 14-15). Maxon Industries Inc., which thereafter became and is now the owner of the patents in suit, was joined as a party plaintiff without prejudice to proceedings already had (Vol. I, pp. 185-187).

*Patents Nos. 2,837,227 and 2,989,196 will hereafter be identified by '227 and '196, respectively. Appellant will hereafter be referred to as defendant.

The pre-trial conference order placed in issue the validity and infringement of claims 1, 2, 4, 8, 9 and 11 of patent '227 and claims 1, 2, 4, 5 and 6 of patent '196 (Vol. I, pp. 339-349, 220, 330).

Defendant brought a motion to add a count for false marking during trial (which was granted) and the pleadings were amended to include such count based upon evidence adduced during trial (Vol. I, pp. 558-560).

The trial court found patent '227 to be valid and infringed by defendant's "Folda-Lift" loaders [Concl. of Law B, C and E, Vol. I, p. 673]; found patent '196 to be invalid [Concl. of Law G, Vol I, p. 674, not involved in this appeal]; and concluded that plaintiffs had not been guilty of false marking under the law [Concl. of Law I, Vol. I, p. 674]. This appeal seeks a reversal of the trial court holdings that Lagash '227 is valid and infringed and that plaintiffs were not guilty of false marking under the law.

C. The Probable Invalidity of Lugash '227 Indicated at the End of Trial.

Defendant's witnesses included Mr. Vogel, an engineer, president of defendant and **admittedly** a man skilled in the art (Vol. III, p. 354) and Mr. Gabriel, defendant's patent expert and a man with extensive prior experience in the truck loader art (Vol. III, pp. 622-623). Mr. Gabriel qualified as one skilled in the art and he so considered himself (Vol. III, p. 761).

It is defendant's contention that none of plaintiffs' witnesses qualified as being a man skilled in the art. Mr. Comstock (plaintiffs' patent expert witness) had "no specific experience" with power operated loaders of

the type discussed in this law suit prior to being called into the case (Vol. III, p. 272).

By stipulation and order of the court the narrative statements of patent expert testimony filed prior to trial were admitted into evidence as though they were orally presented at trial, subject to cross-examination (Vol. III, pp. 748-753).*

Toward the end of defendant's case after the trial court had heard Messrs. Vogel and Gabriel testify as to the prior art and what it taught to one skilled in the art, the court expressed its doubt about the validity of the two patents in suit (Vol. III, p. 829). After hearing the plaintiffs' rebuttal case, the trial court stated its first impressions on the '227 patent:

"... my first impression is that the plaintiff has a real row to hoe on the validity in view of this prior art." (Vol. III, p. 902).

"... it is very questionable in my mind that it is valid, in view of the prior art." (Vol. III, p. 904).

"But I am also inclined to decide now that it is invalid." (Vol. III, p. 905).

What caused the trial court to change its mind? It is submitted that the Memorandum Opinion, the Findings and Conclusions show that the trial court was confused, misunderstood and misapplied the rule of the *Huston v. Buckeye* case,¹ ignored well-established rules of this Court,² and failed to apply statutory standards of patentability.

*Plaintiffs' statement appears at Vol. I, pp. 188-219; defendant's statement appears at Vol. I, pp. 222-317.

¹Page 30 of this brief.

²Page 34 of this brief.

THE LUGASH '227 PATENT IN SUIT.

Patent '227, which issued June 3, 1958 to Max J. Lugash, relates to a load elevator for use in raising or lowering loads between ground level and the truck bed of a motor truck.

In the appended representation of the Lugash '227 patent drawings (App. C, p. 1) the patented loader includes: a loading platform 43 (blue), a pair of parallel rule linkage systems 42, 44 (green; one pair at each side of the platform), hinged connections 47, 48 between the linkage systems and platform provided by support member 50 (yellow), stop means 53 (red) to support the platform in load carrying position and power means 32 (brown) to lift the platform or to allow it to descend [See: Find. of Fact 7, Vol. I, p. 664].

The lifting arms 42, 44 are hinged by bolts 47 and 48 to the platform support member 50 between pairs of flanges 49, 49 carried by the front face of the support member or "angle iron" 50 [Ex. 1, Col. 3, lines 14-17]. Inwardly of flanges 49, 49 there are two more flanges 51, 51 on member 50 also receiving the hinge bolts 48, 48. The platform (bracket arms 52, 52) is thereby pivotally mounted or hinged by the hinge bolts 48, 48 (between flanges 49 and 51) to support member 50 [Ex. 1, Col. 3, lines 43-44].

Ledge element 53 (red) **prevents** pivotal movement of the platform arms in a clockwise direction beyond a horizontal position, but **permits** manual pivoting of the platform in a counter-clockwise direction about the hinge bolts 48, 48 until it rests on cross member 56 [Ex. 1, Col. 3, lines 44-65].

The Lugash '227 file history discloses that the original broad claims directed to a power operated parallelo-

gram lifting arm loader were **rejected** on old prior art truck loader patents [Ex. A, p. 17]. The single feature of Lugash '227 not found in the cited art and the **only feature alleged by the patentee to be novel** (during proceedings before the Patent Office) was that the '227 platform **can be manually moved** or pivoted back on hinge bolts 48 **at the discretion** of the operator into an inverted, out-of-the-way position beneath the truck bed.

“ . . . the device when folded up . . . , is completely out of the way and thus permits the vehicle to be backed up to a loading dock.” [Ex. A, p. 23].

It is this folding which caused the issuance of the Lugash '227 patent [Ex. A, pp. 23-24].

“It is crystal-clear that after the first rejection, Scoggin relied entirely upon the sealing arrangement as the exclusive patentable difference in his combination. It is likewise clear that it was on that feature that the Examiner allowed the claims.”

Graham v. John Deere Company of Kansas City, U.S., 86 S. Ct. 684, 701 (Feb. 21, 1966).

Plaintiffs are not now free to assert a broader view of Lugash '227 beyond this single concept of manually pivoting or moving the platform element on its hinge bolts back over the lifting arms to allow its placement in an out-of-the-way position.

“Here, the patentee obtained his patent only by accepting the limitations imposed by the Examiner. The claims were carefully drafted to reflect these limitations and Cook Chemical is not now free to

assert a broader view of Scoggin's invention. The subject matter as a whole reduces, then, to the distinguishing features clearly incorporated into the claims."

Graham v. John Deere Company of Kansas City, supra, 86 S. Ct. at 702.

The subject matter of Lugash '227, as in the *Graham* case, *supra*, as a whole, reduces to the single feature of permitting inversion of the platform. Defendant contends that this "distinguishing feature" is **found in the non-cited art relied upon at trial** (particularly Narvestad, App. C, p. 2) and that Lugash '227 merely suggests an asserted new use (or non-use) for the identical, old truck loader apparatus disclosed in the expired Novotney '403 patent (App. C, p. 3) in the same manner to obtain the same results as suggested by the prior art (such as Narvestad).

WHAT LUGASH '227 DID NOT INVENT.

This Court and the Supreme Court have repeatedly stated that a patent cannot claim and withdraw from the public that which is public knowledge. But that is exactly what the plaintiffs' patent wrongfully attempts to do.

This Court can take judicial notice that Lugash did not invent a truck, nor a power operated loading device to be employed with the truck; these have been in the public domain for fifty years. Can plaintiffs contend that Lugash was the first to hinge a loader platform into a stored out-of-the-way position to permit the truck to be backed up to a loading dock for ready loading? No, that has been common practice for many years as shown by any of the prior Narvestad, Peters or Jester

patents in which the loader platforms are pivotable about hinge means in identical manner to be inverted over the lifting arms [Find. of Fact 19, Vol. I, p. 664] and in the prior commercially successful Daybrook "DA" and Anthony "Drop-Leaf" loaders where the loader platforms are hinged down into an out-of-the-way position [Exs. E-G, AD] allowing dock loading.

The parallel linkage lifting arms, the brackets and support members, the hinge pins which pivotally connect the platform to the support member were not invented by Lugash but are clearly shown in the prior art [Exs. C, D, E-G and AD] including the expired patent to Novotney '403 as will be discussed in detail hereinafter.

Detailed discussion of these prior art patents on pages 20 to 23 of this brief and defendant's trial Exhibits AM-1 through AM-6 convincingly show that **every element for the same purpose was present in the prior art devices.** The patent is invalid since:

"... it consists of no more than a combination of ideas which are drawn from the existing fund of public knowledge and which produces results that would be expected by one skilled in the art."

Griffith Rubber Mills v. Hoffar, 313 F. 2d 1, 3 (C.A.9).

Plaintiffs cannot challenge the fact that all of the elements are old [Find. of Fact 8, Vol. I, p. 664]. Plaintiffs will be forced to admit that the purported novelty lies only in the use of the hinge connection and stop means:

"permitting inversion of the platform." [Ex. 1. claim 8, lines 42-45].

The discretionary pivoting of a hinged platform, trap door or any other element on an old hinge is not an invention conforming to the statutory requirements of novelty, utility and unobviousness, “. . . each of which must be satisfied” (*Graham v. John Deere of Kansas City, supra*, 86 S. Ct. 694).

To hold that the Lugash patent is valid, this Court would have to state that a patent can monopolize the discretion of a man in moving an old member on an old hinge (Novotney '403) in a manner taught by the prior art (Narvestad).

Note that the trial court concluded that:

“ . . . It is mechanically *possible* to invert the platform in said Novotney device.” [Find. of Fact 16, Vol. I, p. 666].

Patentability cannot be based upon the mere recognition of an alleged new function (folding) for an old device (Novotney '403) even though the prior inventor may not have realized his apparatus could be used in such a manner (*Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 89 (6th Cir. 1943)).

Appellant is confident that this Court will be compelled to hold invalid a patent which attempts to prevent a person from moving an old hinged member of an old structure which is mechanically or manually capable of being moved. One cannot patent the obvious or preclude the exercise of discretion.

Moreover, to hold Lugash '227 valid, this Court would have to ignore the fact that prior patents, not cited by the Patent Office, actually disclose hinged platforms which are manually pivoted or folded into inverted position to solve the identical problem of dock loading, in the identical way, as in Lugash '227.

The above brief statement of the case emphasizes the pertinency of the following specification of errors and the questions presented to this Court.

SPECIFICATION OF ERRORS.

1. The trial court erred as a matter of law in concluding patentability [Concls. of Law B and C] upon Findings of Fact that Lugash '227 stored the loader platform under the truck bed only "in a more facile and efficient manner" [Find. of Fact 24] and produced merely "significant economies of time and money to users" [Find. of Fact 28] instead of applying the more rigorous requirement of a new, unusual, surprising or unexpected result required of combination claims in *A. & P. Tea Co. v. Supermarket Corp.*, 340 U.S. 147 (1950), a high level of patentability reaffirmed by *Graham v. John Deere Company of Kansas City, supra*, and required for patent validity in *United States v. Adams*, U.S., 86 S. Ct. 708 (Feb. 21, 1966).

2. The trial court erred as a matter of law by relying upon a "presumption" of validity and "make-weight" factors such as commercial success instead of applying the prerequisite test of obviousness in the light of the combined state of the art. Findings 8, 9, 14, 19, 24 to 28 are in error and show that the statutory requirements for patentable invention were not applied. Findings 13A, 18, 24 and 28 are clearly erroneous and contrary to the evidence.

3. The trial court erred as a matter of law by applying improper tests for determining obviousness (*Graham v. John Deere Company of Kansas City, supra*) in failing to properly determine the differences between

Lugash '227 and the combined state of the art, in ignoring the uncontradicted testimony of defendant's technical experts as to the obviousness of Lugash '227 from the combined teachings of the prior art and in giving undue primary consideration to alleged commercial success [Finds. of Fact 8, 9 and 14], supposed absence of commercial success of the prior patented devices [Finds. of Fact 19 and 24] and the length of time the Lugash combination was assertedly overlooked by others [Finds. of Fact 24-28], all of which are at best only secondary considerations or sub-tests. The trial court erred in placing any reliance upon the supposed absence of use of the prior patents [Finds. of Fact 19 and 24] and their alleged long but overlooked availability [Finds. of Fact 24 and 28] since it is irrelevant that no one apparently chose to avail themselves of the knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search (*Graham v. John Deere Company of Kansas City, supra*, 86 S. Ct. 703).

4. The trial court erred as a matter of law in relying upon a presumption of validity for the '227 patent (Vol. I, p. 567, lines 18-19) since any such presumption was overcome by any, or all, of the non-cited prior Narvestad, Peters and Jester patents, all of which disclosed the folding or inverting of a loading platform not found in the art considered by the Patent Office Examiner. A presumption cannot take the place of statutory requirements.

5. The trial court erred in finding a new combination of admittedly old elements [Finds. of Fact 7, 8 and 24] since all the old '227 elements are found in the same cooperative relationships in the prior art (as in

Novotney '403) and it erred as a matter of law [Concls. of Law B and C] in not requiring these old elements to obtain or perform some surprising, unexpected or non-obvious function or result in the combination that they did not perform or obtain out of it, as required by *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545 and *United States v. Adams*, *supra*.

6. The trial court erred as a matter of law in failing to make any Findings of Fact specifying differences between the claimed subject matter of Lugash '227 and the combined state of the art taken as a whole. Findings of Fact 16 and 17 only allege differences between Lugash '227 and Novotney '403 taken alone (Vol. I, p. 666). Findings of Fact 19-22 only assert differences between Lugash '227 and the similar teachings of Narvestad, Peters and Jester isolated from the other art (Vol. I, pp. 667-668). No Finding of Fact states any differences between the combined teachings of the art [such as Novotney '403 and Narvestad, or Wood '135 and Narvestad, Exs. AM-5 and AM-6] and the claimed subject matter of Lugash '227. The trial court's ultimate conclusions of non-obviousness [Finds. of Fact 13A, 18, 25 and 28] are unsupported and fail to properly advise the Appellate Court of the basis for its decision (*Welsh v. Strolee*, 9th Cir. 1961, 290 F. 2d 509).

7. The trial court erred as a matter of law in failing to find anticipation of the Lugash '227 claimed subject matter in view of Novotney [Find. of Fact 15] because of an erroneous view of the law which led the trial court to conclude that the folding or inverting of the platform was not "inherent" in Novotney [Find. of Fact 17] while at the same time "mechanically possible" [Find. of Fact 16]. There is no evidence to sup-

port the portion of Finding of Fact 16 which states that the folding of the platform possible in Novotney would not produce “substantially the same result as in plaintiffs’ patent ’227” and the Findings are silent as to why the same result wouldn’t be attained.

8. The trial court erred in finding that the Narvestad, Peters and Jester patents disclose a different mode of operation in “inverting of the platform” and do not disclose “any means” whereby the lifting arms and power means can be utilized in storing the loader platform [Finds. of Fact 19, 20 and 21] as allegedly accomplished for the first time in Lugash ’227 [Find. of Fact 8]. In each of Lugash ’227, Narvestad, Peters and Jester the platform is moved identically, *i.e.*, by manually pivoting the platform over the lifting arms. In Narvestad, Novotney and Jester, lifting arms and associated power means are disclosed which can be employed to raise or lower the platform whether moved into inverted position or not.

9. The trial court erred in failing to find that parallel linkage arms (admitted to be long known in the art) are obvious substitutes for the lever arms employed in Narvestad, Peters or Jester [Finds. of Fact 19 and 22]. Lugash ’227 is merely an obvious modification of any of them.

10. The trial court erred in finding that the ’227 loaders were the first commercially successful loaders that could be stored in an out-of-the-way position [Finds. of Fact 8 and 24]. The prior Anthony “Drop-Leaf” loader [Ex. AD, Find. of Fact 24] and Daybrook “DA” loader [Ex. E-G, pp. 12-13] were commercially successful and accomplished the same results in positioning the loader platform out-of-the-way for dock load-

ing. The Findings do not state any problem unsolved in the art prior to Lugash '227.

11. The trial court erred in attributing the alleged commercial success of plaintiffs' "Tuk-A-Way" loaders [Exs. 21 and 22, Find. of Fact 9] to Lugash '227. The preferred exemplary embodiments shown in '227 were not a success. It was the loader described and claimed in the invalid '196 patent filed only five months after '227 that attained the sales of Plaintiff's Exhibit 22 and are shown in the "Tuk-A-Way" brochure Exhibit 21. There was no immediate wide adoption by the trade. Less than 100 units per year were sold by plaintiffs from 1957 to 1960. It was only after 1960 and after defendant's sales of the "Folda-Lift" to the trade that plaintiffs' sales increased measurably. Findings of Fact 26 and 28 are in error to the extent that they allegedly import non-obviousness and success of the '227 loader. Defendant's previously successful EB-1500 hydraulic loader is as responsible for defendant's success [Find. of Fact 14] as any other factor.

12. The trial court erred in finding that the defendant infringed Lugash '227 patent by its "simple" and "not major" modification [Find. of Fact 13A] of the existing EB-1500 hydraulic lift gate loader of a type long successful in the art [Finds. of Fact 10 and 11] to incorporate therein the simple and easily accomplished concept of inverting the platform over the lifting arms to place it in an out-of-the-way position, a concept "fully disclosed and dedicated to the public" in each of the Narvestad, Peters and Jester patents (*Graham v. John Deere Company of Kansas City, supra*).

13. The trial court erred [Finds. of Fact 29 and 30 are erroneous] because defendant's "Folda-Lift" loaders

do not employ the mode of operation of Lugash '227 of folding the platform back on the linkage. Defendant's loader platform abuts the hydraulic cylinder which is part of the power means and not the linkage. Also, the parallel rule linkage systems of Lugash '227 are not employed in the ramping type of "Folda-Lift" loaders of defendant which do not maintain the platform level as intended in Lugash [Find. of Fact 22].

14. The trial court erred [Find. of Fact 38] in finding the '196 patent mismarking to be the result of "innocent mistake" and without "intent to defraud" or "deceive" the public.

The fact of mismarking was established during the testimony of Mr. Murray Lugash (Vol. III, pp. 289-319) who stated that he didn't know who determined that the patent numbers went on the non-unitary H-23 Model (Vol. III, p. 307). Plaintiffs presented no other witness who did know why the '196 patent numbers were applied to these loaders. The false marking intent must be presumed until rebutted (*Krieger v. Colby*, 106 F. Supp. 124). The fact of mismarking was uncontradicted and the presumption of intent was not overcome.

SUMMARY.

The file history of the '227 patent [Ex. A] shows that truck loaders having power operated parallelogram lifting arms connected to a support member to which a loading platform is hinged or pivoted are old (Richards and Ives, Vol. III, p. 639). No new or different construction, function, result or mode of operation was or is claimed for the '227 loader when actually used for loading or unloading a truck (Vol. III, pp. 624, 864). When placed in its stored position the apparatus performs no function (Vol. III, pp. 41 and 633).

The claims of the patent **do not claim an inverted platform**, a loader in stored away position or any manner of moving the platform and/or lifting arms into a stored position. Claim 8 merely specifies a particular stop means (element 53, colored red in Appendix C, p. 1) which permits manual pivoting of the platform on old hinge means in one direction, but prevents it in the other. **The identical construction and stop means is found in Novotney '403** [App. C, p. 3; Exs. AM-1, AM-2], **a prior art patent not found nor considered by the Patent Office** in acting on Lugash '227. The trial court found that it is possible to fold the Novotney platform back over the lifting arms [Find. of Fact 16, Vol. I, p. 666], as is shown in defendant's Exhibits AM-1 and AM-2. Other prior art patents such as any of Narvestad, Peters and Jester also show invertible or foldable platforms.

Lugash '227 thus reduces to merely the manipulation of an old platform about an old hinged connection in an old loader construction to place the platform in an inverted out-of-the-way position. But, such inverting of a loader platform into an out-of-way position is admittedly not new [Find. of Fact 19, Vol. I, p. 667]. For example, it is fully disclosed in the prior Narvestad patent (App. C, p. 2) not considered by the Patent Office. (Note the identity of the objects of Lugash '227 and Narvestad set out in the Appendix).

The Lugash '227 claims read on and attempt to withdraw from the prior art the old loader construction of Novotney '403 (App. C, p. 3) based only on a supposedly new manipulation (folding of the platform) of the old Novotney loader in a manner suggested by Narvestad and found possible in Novotney.

Defendant's technical expert witnesses Vogel and Gabriel testified that had they been presented with the combinations of Narvestad and Novotney (Vogel, Vol. III, pp. 462-463, 485-486; Gabriel, Vol. III, pp. 699-701), or the combination of Wood '135 and Narvestad [Gabriel, Vol. III, pp. 718-724 and Exs. AM-5 and AM-6] in 1957 at the time of the alleged Lugash invention, it would have been obvious to make the '227 combination to provide a parallel arm hydraulic loader with a foldable platform.

Defendant's combination of Wood '135 and Narvestad [Exs. AM-5 and AM-6] was obvious to and actually made by the Patent Office in acting on the second Lugash '196 patent in rejecting the original broad claims [Ex. B, p. 17]. Such combination was never considered by the Patent Office in acting on Lugash '227. It should have been; Lugash '227 issued by inadvertence.

Plaintiffs did not present evidence rebutting the obviousness of Lugash '227 in the light of the combined showings of the prior art patents. Defendant's evidence is uncontradicted. **The trial court** in its Memorandum Opinion and in the Findings of Fact **does not state a single reason why the combinations of the teachings of the prior art patents** relied upon by defendant (such as Novotney '403 in view of Narvestad '529) **do not render the Lugash '227 patented combinations obvious** to one skilled in the art. The trial court's decision and the Findings of Fact are all directed to the sub-tests of commercial success, long felt need and failure of others to commercially succeed with similar loaders in support of non-obviousness of the '227 patent found in Finding of Fact 7 (Vol. I, p. 664).

At the end of the trial, the court expressed its first impressions to hold Lugash '227 invalid. The Memorandum Opinion (Vol. I, pp. 561-573) discloses some of the trial court's thinking in changing to its eventual holding of validity: the folding of the loader platform possible in Novotney '403 was erroneously found not to be "inherent" (Vol. I, pp. 563-564); the non-cited patents including Narvestad, Peters and Jester, though disclosing the folding platform feature of Lugash '227 not found by the Patent Office were somehow not found to overcome the presumption of validity.

Since the hinging movement of the platform into folded position was shown by Novotney, Narvestad, Peters and Jester, plaintiffs were compelled to fall back on another fallacious argument, namely that the prior folded platforms were not raised by power (Comstock, Vol. III, pp. 879-880). This argument fails because:

- a. power actuated lifting arms carrying a hinged platform element are very old;
- b. the old arms will lift the platform when it is empty, when it is full, when it is painted green, or when it is manually pivoted into a folded position, with no change in construction or mode of operation; and
- c. **it is obvious that power driven lifting arms will lift whatever is carried on them.**

Prior patents have shown platforms hinged to lifting arms; it would be inequitable to now preclude the public from manually pivoting a platform if they so desired.

How can this Court hold that a new, non-obvious or unexpected result is attained by using old elements in an old combination, to perform their normal and ex-

pected function? There is no basis in fact and no support in law for Findings of Fact 8, 21, 22, and 23 (Vol. I, pp. 664 and 667).

How has the '227 patent *added* to the sum of useful knowledge in a manner beyond the ordinary exercise of skill in the art? **A prerequisite of patentability is that the subject matter be unobvious** (35 U.S.C. §103). Here we have uncontroverted evidence that it was obvious. Make-weights such as commercial success or added facility do not satisfy statutory requirements.

THE QUESTIONS PRESENTED.

1. Did the trial court err, as a matter of law, in failing to apply the statutory standard of invention required by the *A. & P. Tea Co.* case and reiterated by the recent Supreme Court decisions?
2. Do the claims of Lugash '227 define a patentable invention (conforming to each of the statutory requirements of novelty, utility and non-obviousness) in the light of all prior knowledge and expected skill of men in this art?
3. Do the claims of Lugash '227 define a patentable invention over the showings of Novotney '403, Narvestad '529, Wood '135, Peters '577, Jester '243, and other patents of record herein?
4. Did the trial court err in substituting its own opinion (as to obviousness) for the uncontradicted testimony of experts in this art?
5. Did the trial court err in relying upon a presumption of validity instead of applying the prerequisite statutory tests of invention, repeatedly enunciated by this Court and reiterated recently by the Supreme Court?

6. Is the presumption of validity dissipated when prior patents, not considered by the Patent Office, show the same elements in the same combination for the same purpose?
7. Do the patent statutes contemplate the grant of a patent which would preclude a person from exercising his discretion in operating an old machine mechanically capable of such operation?
8. Can defendant be held to infringe the Lugash patent by employing a construction taught and suggested by expired prior art patents?
9. Can a presumption of intent to mismark, based upon evidence of the established fact that plaintiffs falsely marked their loaders with the '196 patent number, be disregarded without rebuttal?

THE PRESUMPTION OF VALIDITY IS DISSIPATED BY THE PERTINENT PRIOR ART NOT BEFORE THE PATENT OFFICE.

In acting upon the patent application which issued as Lugash patent '227, the Patent Office did not consider pertinent prior art patents including Narvestad 2,680,529, Peters 113,577, Jester 2,033,243, Novotney 2,194,403 and the Wood Patent '135. The normal presumption of validity is therefore overcome pursuant to the many decisions of this Court including

Mettler v. Peabody Engineering Corp., 77 F. 2d 56 (C.A. 9);

McClintock v. Gleason et al., 94 F. 2d 115 (C.A. 9);

Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F. 2d 632, 634 and Note 4, 637.

and the Supreme Court in

Graham v. John Deere Company of Kansas City,
..... U.S., 86 S. Ct. at 702.

Specific reference is made to those uncited patents because they disclose the “folding up aspect” of the platform—the only feature represented to be novel to the Patent Office [See Ex. A, p. 24; Gabriel, Vol. III, pp. 645 and 698].

But these patents clearly show this “feature” and even the Findings admit that they

“ . . . disclosed the folding of a platform by hinged means to an inverted position over the lifting arms . . . ” [Find. of Fact 19, Vol. I, p. 667].

Therefore that which was represented to the Patent Office as being novel **was not novel**. The presumption of validity is completely overthrown. The subject matter of Lugash '227 is but an obvious following of the teachings of the prior art.

Your Honors are requested to look at Exhibit C-4 and Appendix C, page 2, to fully appreciate the pertinency of the uncited patent next discussed in detail.

1. NARVESTAD '529.

This patent discloses a truck loader platform 26 (blue) hinged to lifting arms 20, 21 (green) by hinged connections provided by a platform support member 24 (yellow). Stop means (red), provided by the extreme ends of arms 21 protruding through member 24 support platform 26 in its loading position while the power means 16 (brown) may be employed to raise or allow lowering of the platform. The lifting arms 21, 21 are not parallel linkage systems and the platform

ramps, *i.e.*, slightly changes its angle of disposition, during raising and lowering.

Plaintiffs admit that Lugash **did not invent parallel arms** to hold a platform level as it is raised. This is shown in old patents to Wood '135, Richards '166, and Shadbolt '822 (1896) and in the commercial Daybrook [Ex. E-G] and Anthony [Exs. AC and AD] brochures. **Uncontradicted testimony establishes that it would be obvious to substitute the linkage of the Wood '135 patent for Narvestad's lifting arms** [Vol. III, pp. 671-672 and 718-724, Exs. AM-5 and AM-6].

A prior patent showing "hinge means permitting inversion of the platform" was not before the Patent Office during the prosecution of the Lugash application. Such hinge means, however, are fully disclosed in Novotney as well as in Narvestad, whose platform 26 can be inverted or folded out of the way as shown in Fig. 7 so as to allow dock loading.

2. NOVOTNEY '403.

The Novotney Patent No. 2,194,403 (App. C, p. 3) discloses a truck loader identical to Lugash '227. A platform 9 (blue), is hinged to a pair of parallel rule linkage systems 7, 7' (green) by a platform support member 8 (yellow). Support member 8 forms the lower vertical links joining lifting arms 7, 7' and pivotally mounts platform 9 just as the platform support member 50 joins the arms 42, 44 and pivotally mounts platform 43 of Lugash '227. Stop means 11 (red) support the platform in horizontal load carrying position and hydraulic power means including rod 14 and cylinder F (brown) are employed to optionally raise or lower the platform between the ground and truck bed.

Novotney '403 not only discloses the same combination of loader elements operating in identical fashion as Lugash '227 while loading or unloading the truck, but also discloses the identical kind of hinged connections between the lifting arms and loader platform described by Lugash '227. **The Novotney hinge means permits inversion of the platform** and the trial court so found in concluding that "it is mechanically possible to invert the platform in the said Novotney device" [Find. of Fact 16, Vol. I, p. 666]. The lifting arms can be raised or lowered whether the platform is extended or pivoted back over the lifting arms at the discretion of the user.

Similar folding platforms are shown in the non-cited Peters (Australia) patent 113,557 [Ex. C-2] and Jester patent 2,003,243 [Ex. D-4]. The trial court found that these patents "disclosed the folding of a platform by hinged means to an inverted position over the lifting arms" [Find. of Fact 19, Vol. I, p. 667].

The trial court erred in giving significance to the presumption of validity of the Lugash '227 patent in finding validity in its Memorandum Opinion (Vol. I, p. 567, lines 18-19).

"Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here."

Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F. 2d 632, 634 and Note 4, 637 (9th Cir., 1951).

The trial court has apparently completely **ignored the above rule of law** which this Court has reiterated many times. The trial court recognized that the folding was old in Narvestad, Peters and Jester, but made an error of law in not realizing that, in accordance with the rule, these patents individually or in combination overcame the presumption of validity.

The recent Supreme Court case of *Graham v. John Deere Company of Kansas City*, 86 S. Ct. 684 (1966) is directly applicable to the facts in this case. In the *Graham* case the alleged “distinguishing feature” was a sealing arrangement which was not in the prior art patents before the Patent Office, but was found in an uncited Livingstone patent before the court.

“Moreover, the space so strongly asserted by Cook Chemical appears quite plainly on the Livingstone device, a reference not cited by the Examiner.

“The substitution of a rib built into a collar likewise presents no patentable difference above the prior art. It was fully disclosed and dedicated to the public in the Livingstone patent.”

Graham v. John Deere Company of Kansas City, supra, 86 S. Ct. at 702.

The Supreme Court therefor concluded that it would be **obvious** to employ the sealing arrangement taught by the Livingstone device in combination with the other prior art, even though the hold-down cap of Livingstone was applied to a somewhat different device than that employed in the patent in suit. (In Livingstone, the hold-down cap was employed to hold down a spout in a container rather than a sprayer head.) The Supreme

Court considered the prior art as a whole and combined the teachings thereof to demonstrate the obviousness of the patented construction.

This Court must consider the truck loader art as a whole. It is obvious to employ the platform folding arrangement taught by the Narvestad, Peters or Jester patents in combination with the other prior art loaders of Exhibits C and D (such as Novotney '403 or Wood '135) to fold the platform for ease of dock loading (compare the Narvestad and Lugash '227 objects on collapsing and folding the platform, Appendix C, pages 1 and 2).

CLAIMS OF LUGASH '227 DO NOT DEFINE A PATENTABLE INVENTION.

The claims of a patent must particularly and distinctly define the purported invention (35 U.S.C. §112). Let's look at claim 8 of Lugash '227 which the trial court referred to in Finding of Fact 7 as best summarizing the Lugash subject matter. The drawing of the Lugash loader, code colored, appears in Appendix C, page 1. Claim 8 reads as follows:

“In a load lifting and lowering means attachable to a load carrying vehicle at a point thereon below the vehicle bed,

a **platform** (blue) on which the load is carried,
a **pair of parallel rule linkage systems** (green) disposed one each adjacent each side of said platform, each of said linkage systems having one end thereof attached to the vehicle at a point below the plane of the vehicle bed and the other end thereof connected to said platform,

the **connections** (yellow) between said linkage systems and said platform including horizontally disposed **hinge means and stop means** (red) effective to **permit said platform to be swung** on said hinge means into superposed position on said linkage systems and **to prevent said platform from being swung** on said hinge means in the opposite direction beyond a position in which said platform extends with the load carrying surface thereof substantially parallel to the plane of the vehicle bed, and **power means** (brown) operable optionally to lift said platform bodily or to allow said platform to descend."

THERE IS NOTHING NEW AND PATENTABLY NOVEL IN THIS COMBINATION. Please look at page 12 of Exhibit E-G, a catalog of Daybrook power gates. These prior art loaders had a loading platform, parallel rule lifting arms, a connection between the arms and the platform including a hinge or pivot, and power means. Note the matter printed at the bottom of page 12, between the diagrams:

"'DA' platforms give the advantages of ground to truck bed loading and unloading—yet fold to a straight down position to permit dock operations."

Please note that this Daybrook platform **"folds"** to below the truck bed to **permit dock loading**. Lugash did not invent dock loading.

Can there be invention in providing a stop on a hinged element to prevent the element from swinging

too far? No, because each member of this Court has seen such stops on hinged doors, stopping the door from swinging beyond a desired position while permitting the door to swing in the opposite direction as far as you want.

But now let us look at Exhibit AM-2 where a deadly comparison with Novotney '403 clearly shows **each and every** element of Lugash claims 8, 9 and 11 to be old.

This exhibit speaks for itself. The evidence, including the testimony of Vogel and Gabriel, establishes irrefutably that Novotney is a complete anticipation. (See Vol. III, pp. 484-486, 699-701, 775-781, 842-844).

Similarly Exhibit AM-1 shows that each and every element of claims 1, 2 and 4 of Lugash '227 in the same combination for the same purpose is taught by the expired Novotney '403 patent which is now in the public domain.

It is submitted that the claims of Lugash '227 are invalid since the statutory prerequisites of patentable invention (novelty, utility and lack of obviousness) have not been met.

What is in the public domain can be freely used by all. Foldable loading platforms were old; plaintiff cannot deprive a member of the public of the right to manually pivot an old platform which is capable of pivoting about a hinge or pivot pin.

CLAIMS OF LUGASH '227 ARE INVALID BECAUSE INDEFINITE.

35 U.S.C. §112 requires that a patent include “. . . claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”

It is noticeable that the trial court adopted Findings (prepared by plaintiffs) which attribute characteristics of novelty to the Lugash assembly which are **not stated in the claims.**

For example, Finding of Fact 8 states that “power means moves a load platform into and out of a stored position” but that is not in any Lugash claim.

The claims of Lugash '227:

DO NOT REQUIRE that the platform be folded or “swung”;

DO NOT SPECIFY when (or in what position) the platform “may” be swung [But in Finding of Fact 6, the trial court stated that the folding takes place at ground level];

DO NOT STATE what is to be done after a platform is “swung” at the operator’s discretion;

DO NOT REFER to a swung platform as an element;

DO NOT REFER to movement of a platform into stored position;

DO NOT REQUIRE movement of a platform into position under a truck bed [But Findings of Fact 6 and 22 are based on this false premise];
and

DO NOT STATE that the power means are operable with the platform in a “swung” position.

Therefore what plaintiffs represent as the “novel features” are not defined in the claims. The requirements of 35 U.S.C. §112 have not been complied with, and the claims are **invalid**. The only positive elements specified in the Lugash claims read directly upon the old expired construction shown in Novotney '403.

The Supreme Court has stated:

“The statutory requirements of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise.”

United Carbon Co. v. Binney & Smith Co., 317 U.S. 228, 236.

Plaintiffs will probably try to argue out of this corner by claiming that the platform “may” be swung in their construction and that the power means “may” be operated after the platform is swung. **Similarly**, however, **the platform 9 of Novotney '403 “may” be swung** and the power means of Novotney “may” be operated after it is swung. The trial court found that such movement is possible.

At all events the claims of Lugash are invalid because they do not point out the alleged (if any) “novel feature.” The claims are invalid because they attempt to cover that which is already in the public domain; one cannot get a patent by relying upon semantics or by reading between the lines of a claim. Minor modifications are not the subject of valid patents.

“A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitu-

tion of equivalents, doing substantially the same means with better results, is not such achievement as will sustain a patent.”

Smith v. Nichols, 88 U.S. 112 at 119

It is submitted that this Court is compelled to hold all of the claims invalid on at least two grounds, namely: (A) lack of invention and (B) failure to comply with 35 USC §112.

Note is here made of an ancillary rule which is applicable where the claims do not specify the purported novelty, namely:

“Of course, what is not claimed is public property. * * * The public has the undoubted right to use, and it is presumed does use, what is not specifically claimed in a patent.”

Mahn v. Harwood, 112 U.S. 354 at 361.

An invalid patent cannot be infringed: defendant cannot infringe if he uses what is not claimed.

THE TRIAL COURT WAS CONFUSED AS TO THE LEGAL EFFECT OF THE FOLDING OF THE PLATFORM SHOWN IN NOVOT- NEY '403.

The Novotney '403 loader platform can be folded back over the lifting arms without any modification of its construction [Vogel, Vol. III, pp. 484-486; Gabriel, Vol. III, pp. 699-700, 775-781; Exs. AM-1 and AM-2; Find. of Fact 16, Vol. I, p. 666]. However, the trial court required that the inverting of the platform (possible in Novotney) be the “essence of the invention contained therein” before it could be considered “inherent” [Mem-

orandum Opinion, Vol. I, p. 564, lines 9-12; Finds. of Fact 15-17, Vol. I, p. 666]. The Memorandum Opinion and Findings clearly show that the **trial court was confused and misunderstood the rule** stated in *Huston v. Buckeye Bail Corporation*, 107 U.S.P.Q. 138.

The essence of the claim before Judge Cecil in the *Buckeye* case was the “turning” of a fishing “sinker” when resting on the bottom of the sea to expose more of its lower red half and thus notify the fisherman that his sinker is on the bottom (*Houston v. Buckeye, supra* at 140). There was no suggestion of the “turning movement” in the prior art Olson patent, but the court there found that **it could so turn** and was therefore inherent. Judge Cecil correctly stated:

“If the turning movement was inherent in the Olson patent it can be said to have been taught by and included in the prior art whether claimed by Olson or not. ‘An inventor is entitled to all that his patent fairly covers, even though its complete capacity is not recited in the specifications and was unknown to the inventor prior to the patent issuing.’ 2nd Syl. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U.S. 428.”

In the instant case, when the trial court found the folding of the platform to be possible in Novotney '403, he had thereby actually found it to be inherent within the meaning of the *Buckeye* case, *supra*. The trial court was confused.

The trial court erred in believing that it was necessary for Novotney '403 to describe in detail the folding of

the platform and its use. That is not the law. The Novotney platform can be folded, and the Novotney '403 patent **is an anticipation** pursuant to numerous authorities:

“An old mechanism fully capable of a use not then observed, anticipates a later patent for the application of that means to the new use. Patentability cannot rest on the observation in a given device of a usefulness not before noticed; and the fact that a party did not in fact use his mechanism for a particular purpose, or even that he did not foresee that such purpose would be a useful one, is not material. *William B. Mershon & Co. v. Bay City Box & Lumber Co.*, C.C. Mich., 189 F. 741. Discovery of new uses for, or newly observed functions of a device, well known in the mechanical or structural arts, is not patentable invention; *Grand Rapids Refrigerator Co. v. Stevens et al.*, 6 Cir., 27 F.2d 243; and the use for which an apparatus was intended is irrelevant, if it could be employed without change for the purposes of the patent. *Dwight & Lloyd Sintering Co. v. Greenawalt*, 2 Cir., 27 F.2d 823.”

Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 89 (6th Cir., 1943).

“ . . . Pipkin found latent qualities in an old discovery and adopted it to a useful end. But that did not advance the frontiers of science in this narrow field so as to satisfy the exacting standards of our patent system. Where there has been use of an article or where the method of its manufacture is known, more than a new advantage of the product must be discovered in order to claim in-

vention. See *DeForest Radio Co. v. General Electric Co.*, 283 U.S. 664, 682. It is not invention to perceive that the product which others had discovered had qualities they failed to detect. See *Corona Cord Tire Co. v. Dovan Chemical Corp.*, 276 U.S. 358, 369.”

General Electric Co. v. Jewel Co., 326 U.S. 242, 247 (1945).

“. . . But the observation of a new use in a prior patented device is not patentable; and the mere fact that the inventor did not use his device for that purpose or did not foresee that the purpose might be useful is immaterial.”

Triangle Conduit & Cable Co., Inc. v. National Electric Products Corporation, 149 F. 2d 87, 90 (3rd Cir., 1945).

Lugash '227 does not disclose anything new over the disclosure of Novotney '403 and is invalid. A contrary finding withdraws the Novotney '403 apparatus from the public domain and gives an undeserved monopoly to plaintiffs. The Novotney '403 loader is an anticipation of Lugash '227 because the platform can be folded over the lifting arms and because it **has the specific construction claimed by Lugash** [EXs. AM-1, AM-2]. Lugash '227 cannot be valid. The trial court's holding of validity must be reversed.

A contrary conclusion would award the plaintiffs with a monopoly extending until 1975 over a loader construction disclosed by Novotney '403 in 1940 and dedicated to the public in 1957.

IT IS NOT PATENTABLE INVENTION TO DO WHAT IS SUGGESTED BY THE PRIOR ART.

Lugash '227 contributes nothing to the fund of public knowledge beyond that already disclosed in the prior art (such as the combination of the teachings of the Novotney '403 and Narvestad patents).

The provision of parallelogram linkages in a load elevating device for vehicles to obtain a level ride platform is admittedly old (Comstock, Vol. III, pp. 272-273). Such linkages are found in the cited prior art patents to Richards and Ives (Gabriel, Vol. III, p. 639) and most of the prior art patents in Exhibits C and D (defendant's prior art patents) starting with the Shadbolt patent which issued in 1896. The Lugash '227 patented combination is **constructed and operates in the same way** as old parallelogram arm loading devices when used for loading or unloading a vehicle (Gabriel, Vol. III, p. 624).

The "folding" of the platform, represented as being novel to the Patent Office, is found in the non-cited Narvestad, Peters and Jester patents. One need only be aware of the teachings of any of Narvestad, Peters or Jester to pivot the platform of Novotney '403 back over the lifting arms to fold it away.

"All you have to do is see that teaching (Narvestad, Peters or Jester) and swing this platform 9 of Novotney '403 over and on top of the arm 7." (Gabriel, Vol. III, p. 701).

"Certainly a person having ordinary skill in the prior art, given the fact that the flex in the shank could be utilized more effectively if allowed to run the entire length of the shank, would immediately

see that the things to do was what Graham did, *i.e.*, *invert the shank and the hinge plate.*" (Emphasis added).

Graham v. John Deere Company of Kansas City,
supra, 86 S. Ct. at 697.

It is obvious that the power means cylinder F of Novotney '403 (and the powered cable 16 of Narvestad) can be employed to raise the lifting arms whether the platform is extended rearwardly or pivoted back over the lifting arms. The natural, expected and unsurprising thing is to manually pivot the lowered platform over the lifting arms in Novotney '403 and then operate the power means until the platform and lifting arms are raised up under the vehicle bed in view of the teachings of Narvestad, Peters or Jester.

"This case is wanting of any unusual or surprising consequences from the unification of the elements here concerned. . . ."

A. & P. Tea Co. v. Supermarket Corp., 340 U.S.
147.

The Constitutional standard of patentability required by this Court, and as imposed thereon by *A. & P. Tea Co. v. Supermarket Corp.*, 340 U.S. 147 (1950), remains unchanged by the recent Supreme Court decisions.

"While the clear language of §103 places emphasis on an inquiry into obviousness, the general level of innovation necessary to sustain patentability remains the same."

* * *

"Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system, which by Constitu-

tional command must 'promote the progress of . . . useful arts.' This is the standard expressed in the Constitution and it may not be ignored. And it is in this light that patent 'validity requires reference to a standard written into the Constitution'. *A. & P. Tea Co. v. Supermarket Corp.*, *supra* at 154."

Graham v. John Deere Company of Kansas City, *supra*, 86 S. Ct. at 686-687 and 688.

This Court has consistently applied the Constitutional standard:

"Thus, the statute prescribed, as a condition of patentability, that what has been accomplished must be such that it would not have been obvious to a hypothetical person skilled in all that could have been known, at the pertinent time, in the field to which the invention relates.

"It follows that though a device may be new and useful, it is not patentable if it consists of no more than a combination of ideas which are drawn from the existing fund of public knowledge, and which produces results that would be expected by one skilled in the art.

Griffith Rubber Mills & Hoffar, 313 F. 2d 1, 3 (9th Cir., 1963).

Lugash '227 does not add to the sum of useful knowledge and fails to meet the standard expressed in the Constitution and referred to in *A. & P. Tea Co. v. Supermarket Corp.*, *supra* at 154.

OLD ELEMENTS IN AN OLD COMBINATION ARE NOT PATENTABLE.

It must be abundantly clear by this time that the evidence establishes that each and every element of the Lugash claims is old and that the combination of elements is old.

“Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge.”

A. & P. Tea Co. v. Supermarket Corp., 340 U.S. 147 at 152.

“The mere aggregation of a number of old parts or elements to which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.”

Lincoln Engineering Co. v. Stewart-Warner Corp., 303 U.S. 545 at 549.

The operative function of the Lugash platform is to support loads being moved between the ground and the truck bed levels, **the same function of all loading platforms in the prior art.** The hinged connections between the platform and the platform support member (50 in '227) of Lugash perform the same function that they always have, to merely pivotally mount the platform to the support member.

The lifting arms of the prior art Narvestad and Novotney '403 patents are power operated to function to raise and lower their loader support members (and connected platforms) during loading and unloading as

in Lugash. It is obvious that the power means of both Narvestad and Novotney '403 can be employed to raise the lifting arms and support member 24 after the loader platform has been manually inverted at ground level just as in Lugash.

All power operated lifting arms, having a connecting member to which a platform is hinged or pivoted, **will perform their normal and expected function to lift the platform whether it is empty or loaded or whether the platform is hinged into one position or another.** Would it be patentable invention to claim the same old combination of elements and state that you can raise the platform for purpose of amusement? Would this give rise to a new mode of cooperation of these old elements? Of course not, but Findings of Fact 22 and 23 **erroneously** attribute "two distinct modes of cooperation", one for load bearing purpose and one for storing purpose. Why not a third mode for purpose of amusement?

The trial court erred as a matter of fact [Finds. of Fact 7, 8 and 24] in finding a new combination of admittedly old elements in Lugash '227 where the same combination of old elements is found the prior art loaders, such as in Novotney '403. **The trial court erred as a matter of law** [Concls. of Law B and C] in not requiring this combination of admittedly old elements [Find. of Fact 8] to perform some new, unusual, surprising or unexpected function in the combination than they did not perform out of it, as required by *Lincoln Engineering Co. v. Stewart-Warner Corp.*, *supra*, and *United States v. Adams*, *supra*.

UNCONTRADICTED TESTIMONY ESTABLISHES OBVIOUSNESS.

The **only** persons skilled in the art to testify as to the obviousness of the teachings of the state of the art as of 1957, when Lugash purportedly made his invention, are Messrs. Vogel and Gabriel who found the entire '227 combination claimed in the prior existing fund of public knowledge. The testimony is clear and definite and appears in Volume III, pages 462-463, 485-486, 699-701, 718-724.

Plaintiffs never cross-examined Messrs. Vogel or Gabriel as to the obvious teachings of the combined references relied upon by defendant, **never presented rebuttal expert testimony** nor argument as to why these combinations could not be made, nor presented any evidence which would show any distinguishing features between the combined state of the art and the combinations of elements claimed in the Lugash '227 patent.

Plaintiffs' counsel never asked his witness, Mr. Comstock, whether in his opinion Lugash '227 would, or would not, be obvious to one skilled in the art in view of the combined teachings, or state, of the art. It must be assumed that plaintiffs' patent expert, Mr. Comstock, was not examined by plaintiffs upon the combinations of references relied upon by defendant because his testimony thereon would not have been favorable to plaintiffs' position.

Plaintiffs' counsel carefully refrained from asking his expert whether the Lugash '227 patent would be obvious in view of the combination of a first reference teaching a power-operated parallelogram linkage system loader (such as Novotney '403 and Wood '135;

or Richards and Ives of the cited prior art) and any of the Narvestad, Peters or Jester references which disclose the folding up concept. Mr. Comstock's "résumé of testimony" (Vol. I, pp. 188-219) filed prior to the trial does not deal with any combination of references or make any statements as to the obviousness or non-obviousness of the Lugash '227 patent over the state of the art.

It can only be assumed from the foregoing that the plaintiffs' patent expert was unwilling to testify that the Lugash '227 claimed subject matter is non-obvious over the state of the art.

THE TRIAL COURT ERRED IN IGNORING THE OBVIOUSNESS OF LUGASH '227 AS ESTABLISHED BY EXPERT TESTIMONY.

The Supreme Court has stated, and recently repeated in *Graham v. John Deere Company of Kansas City, supra*, that the judiciary

"Is most ill-fitted to discharge the technological duties cast upon it by patent legislation."

Marconi Wireless Co. v. United States, 320 U.S. 1, 60 (1943).

The trial court **initially considered Lugash '227 to be invalid** over the state of the art established through defendant's technically skilled experts, Vogel and Gabriel (Vol. III, pp. 902-905). The trial court **subsequently substituted its opinion for that of the experts** in finding Lugash '227 non-obvious over the art. But, the trial court is not technically expert in the art.

The trial court committed reversible error in rejecting the experts' opinions on the obviousness of Lugash

'227, and in effect, not deciding the issue but rather concluding validity on inferences and secondary, make-weight grounds.

SECONDARY TESTS DO NOT PREVAIL WHERE STATUTORY REQUIREMENTS OF PATENTABILITY ARE NOT MET.

The Supreme Court recognized in the *Graham* case, *supra*, in discussing the Cook Chemical patent that the evidence disclosed that “a serious problem” had existed for many years in developing sprayers that could be integrated with the containers and that the Scoggin’s device “was well-received and soon became widely used” (*Graham v. John Deere Company of Kansas City*, *supra*, 86 S. Ct. 2 at 699). Cook Chemical’s expert testified it was the first “commercially successful, inexpensive, integrated shipping closure pump unit . . .” and it was urged that the long-felt need in the industry for the device, the inability of others to produce it and its commercial success all evidenced the non-obvious nature of the device at the time it was developed. The trial and appellate courts had agreed.

But the statutory prerequisites of novelty, utility and non-obviousness are paramount: The Supreme Court correctly looked past the “inferences” and “subtests” and found:

“However, these factors do not, in the circumstances of this case, tip the scales of patentability. The Scoggin invention, as limited by the Patent Office and accepted by Scoggin, rests upon exceedingly small and quite non-technical mechanical differences in a device which was old in the art. At the latest, those differences were rendered apparent

in 1953, by the appearance of the Livingstone patent, and unsuccessful attempts to reach a solution to the problems confronting Scoggin made before that time became wholly irrelevant. It is also irrelevant that no one apparently chose to avail themselves of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search—a prudent and nowadays common preliminary to well-organized research. *Mast Foos & Co. v. Stover Mfg. Co.*, 117 U.S. 485 (1900). To us, the limited claims of the Scoggin patent are clearly evident from the prior art as it stood at the time of the invention.”

Graham v. John Deere Company of Kansas City, supra, 86 S. Ct. at 703.

This Court should similarly look beyond the alleged commercial success and other “sub-tests” relied so heavily upon by the trial court below and look at the “technical facts”, as in the past.

“Evidence of commercial success cannot overcome clear lack of novelty and invention.”

Pevely Dairy Co. v. Borden Printing Co., 123 F. 2d 17 (9th Cir.).

Also

Stauffer v. Slenderella Systems of Calif., 254 F. 2d 127 (9th Cir.).

The trial court initially considered the Lugash '227 patent invalid upon defendant's showing of the state of the prior art. The prior art is exactly complete in teaching every alleged novel aspect of Lugash '227. The trial court erred in deciding this case by sub-tests rather than the technical state of the art.

The trial court erred in stressing in its findings commercial success; unproved lack of success of prior art devices, demand and need, purported savings of time and money and similar make-weights [Finds. of Fact 9, 19, 24, 26 and 28].

The fact remains that there is no patentable invention defined in the Lugash '227 patent claims that fulfills statutory requirements. This Court must conclude that Lugash '227 adds nothing to the sum of knowledge, is merely an obvious combination of already known ideas in the art and is invalid for failure to meet the Constitutional standard of patentability referred to in *A. & P. Tea Co. v. Supermarket Corp.*, *supra* and *Graham v. John Deere Company of Kansas City, supra*.

LUGASH '227 IS A STEP BACKWARD IN THE ART.

Plaintiffs' device, as represented to the trial court, not only does not produce new, unexpected or surprising results but has lost the advantages of some old results. The early Ducondu '473 patent [Ex. D] discloses a platform that can be used as a tailgate, load elevating platform and be swung down under the truck when not in use (Gabriel, Vol. III, pp. 626-628) to allow dock loading. Lugash has lost the tailgate function of the loading platform old in Ducondu '473 (Gabriel, Vol. III, p. 649).

Plaintiffs' own witnesses admitted the failure of the Lugash device to serve as a tailgate as well as fold out-of-the-way, as in the prior Anthony "Drop-Leaf" lift gate of Exhibit AD (Massman, Vol. III, p. 38). When the lift gate of the Anthony device of Exhibit AD is

folded down to its out-of-the-way position beneath the vehicle, it can be backed up against a loading dock. No new result or function is attained by Lugash '227 not obtained in this prior Anthony "Drop-Leaf" lift gate of Exhibit AD (Goodman, Vol. III, p. 76; Vogel, Vol. III, p. 466).

Messrs. Massman and Goodman even admitted that it **would be an advantage** to have a load elevator which could be used as a tailgate, like Exhibit AD, in addition to being folded to an out-of-the-way position beneath the vehicle (Massman, Vol. III, pp. 39-40; Goodman, Vol. III, p. 78).

The fact is that **the purported folding-over of the platform* is useless**. Plaintiffs' witness Massman testified:

"Q. Now, when the platform in the Tuk-A-Way device is folded under the truck, what function does it have? * * * A. It doesn't have any when it is underneath the truck." (Vol. III, p. 41).

Actually, when the platform of plaintiffs' device is in the folded-up position, **the operator has to put additional, separate gates** on the back of his truck to keep articles from falling off.

"Q. Is it essential to use these gates on the back of your trucks when you use the Tuk-A-Way loading system? A. Yes. We will not rent a truck out without these gates on there." (Grasse, Vol. III, p. 62).

Therefore the Lugash '227 device lifts loads **in exactly the same manner** as all prior lifting platforms, by

*Actual folding and lifting while in folded position is not required by the claims of Lugash '227.

the use of **the same elements** in the **same old relationship**. Prior loading platforms lifted loads and in addition were capable of acting as tail gates; when you use the Lugash device, you now have to put up separate tail gates. Is this a patentable advance, or is it a step backward?

DEFENDANT CANNOT INFRINGE BY USING WHAT IS IN THE PUBLIC DOMAIN.

There are six basic reasons why defendant does not infringe:

1. You cannot infringe an invalid patent.

International Carbonic Engineering Co. v. Natural Carbonic Products Inc., 158 F. 2d 285 (9th Cir.).

2. What is not claimed by the Lugash claims has been dedicated to the public and can be freely used.

"The public has the undoubted right to use * * * what is not specifically claimed in a patent."

Mahn v. Harwood, 112 U.S. 354, 361.

3. What is in the public domain can be freely used.

United States v. Dubilere Condenser Corp., 289 U.S. 178 at 187.

4. One cannot be deprived of exercising normal skills and making obvious modifications to what is in the public domain.

"However, the public is entitled to benefit, without granting special concessions, from such advances as normally flow from the application of the

ordinary skills of one in the trade to the existing fund of public knowledge.”

Griffith Rubber Mills v. Hoffar, 313 F. 2d 1, 3 (9th Cir., 1963).

5. The claims of Lugash '227 require a construction in which the folded platform rests on a stop which is part of the linkage. **This is not done by defendant.**

6. The Lugash claims require a parallel linkage which maintains the platform level during lifting. This is old *per se*. Defendant's lifts employ ramping gate links [Exs. AE and AL] and could not possibly infringe.

The evidence shows that the elements of defendant's loaders were designed prior to Lugash '227 and specification sheets showing the construction of defendant's early EB-1200 loader were distributed in June and July of 1957 [Exs. N, O, S, Vol. III, p. 425; Ex. T, Vol. III, p. 427]. This EB-1000 loader which was renamed "EB-1200" was a design which evolved out of defendant's prior knowledge and experience (Vol. III, p. 423).

In 1960, defendants' president, Mr. Vogel, made a few changes of degree only. He modified the loading platform [Exs. R and AQ] so that it would pivot back against the hydraulic cylinder. Pivoting or folding of a loading platform more than 90° was a concept that was part of the prior art which belonged to the public. This modification of the older model was "a simple matter", "not major in character," and "did not require retooling on the part of defendant" [Find. of Fact 13, Vol. I, pp. 665-666]. Certainly these changes were not inventive for defendant; as a member of the public,

he had the right to utilize what was in the prior art and to exercise his normal skill.

It would have been obvious, in view of Narvestad, to the “hypothetical person skilled in all that could have been known, at the pertinent time,” (*Griffith Rubber Mills v. Hoffar, supra*) to pivot or hinge the platform of the Venco EB-1000, EB-1200 or EB-1500 to place the platform in an out-of-the-way position as actually done by defendant. Mr. Vogel testified as one skilled in the art that it would have been obvious to him how he could apply the Narvestad teachings to his early design EB-1000 loader :

“Q. Now, if you had the disclosure of the Narvestad patent before you in—let us say in 1956, at the time you were aware of the various Anthony and Daybrook loading apparatuses for some two years after the Narvestad patent had issued, would it have been obvious to you how you could position the EB-1000 hydraulic loader platform you designed in early 1957 in an out-of-the-way position when not in use, you didn’t want it to be used as a tailgate, from this Narvestad patent? A. Yes, it would be necessary to merely pivot it over 180 degrees or so to the position as shown in the Narvestad, in Fig. 7, in the Narvestad.” (Vogel, Vol. III, p. 462).

Defendant’s early EB-1000 and EB-1200 loaders are of the same construction as the heavier EB-1500FL construction charged to be infringements here, with the exception of the folding of the platform. Defendant’s EB-1500FL loader of plaintiffs’ Exhibit 4, found to infringe, differs from the prior non-folding EB-1500 loader of Exhibit X only in the hinging and size of the

platform and the provision of a body spacer on the rear end of the truck (**a non-claimed element**) (Vogel, Vol. III, pp. 442-445). The photographs for both exhibits were made of the same truck with merely the platforms replaced. The platform of Exhibit 4 is merely smaller to fold under the truck and does not have an inner flange which would abut the lifting arms. This minor change in degree of size and degree of pivoting beyond the vertical position is an obvious, non-inventive modification in view of the disclosures of Narvestad, Peters and Jester (Vogel, Vol. III, p. 448).

All of defendant's acts are therefore covered by items 1 to 4 of the reasons why defendant, as a member of the public, does not infringe. The remaining reasons why defendant does not infringe are discussed under the next heading.

LUGASH '227 CONSTRUCTION IS NOT FOUND IN DEFENDANT'S "FOLDA-LIFT" LOADERS.

Your Honors will note by examining Exhibit AM-1 that claim 1 of Lugash calls for

“Said parallel rule linkage systems **include stop means against which** said platform may be swung about said hinged mounting to a position overlying and parallel to said linkage systems.”

In claim 8, it is stated that the platform is permitted to be swung “into superposed position **on said linkage systems**”.

Plaintiffs' witness, Mr. Comstock, admitted that the Lugash patent places the lifting arms at the outer sides of the platform to allow the platform to fold onto and

rest on a cross member 56 which is part of the linkage (Vol. III, pp. 207, 208 and 212-213).

Defendant's "Folda-Lift" loaders do not place the lifting arms at the platform sides and when the platform is folded, it **does not** lie on a linkage or any member which is a part of the linkage. The evidence and exhibits clearly show that defendant's platform, when folded, lies on the power cylinder. Therefore, defendant **does not** use the construction to which the Lugash claims are directed. The Lugash claims are limited to a specific relationship of the folded parts (if and when they are folded), but defendant does not employ such relationship.

It is well settled in this circuit, as in all other circuits, that plaintiffs must establish infringement by showing the accused device not only meets the terms of the patent claims, but also employs the same cooperation of elements as the patented device.

"The mere fact that the accused article performs the same function and achieves the same result as the patented article does not necessarily establish infringement unless it can be found that this is accomplished in substantially the same way and, where, in this case, the art is fairly crowded and the main elements of the patent are found or indicated in the prior art, this issue should be determined narrowly, rather than liberally."

Lockwood v. Langendorf United Bakeries, Inc.,
324 F.2d 82 (9th Cir., 1963).

The Lugash claims are limited to a specific relationship: **defendant does not employ such relationship**. Moreover, the trial court erred in finding that all

models of defendant's "Folda-Lift" loaders infringe Lugash '227 because plaintiffs' own witnesses stated that one of the advantages of the Lugash '227 construction is that it maintained the platform level or horizontal while lifting a load and this was supposed to be an advantage over the prior Anthony and Daybrook ramping-type loaders (Massman, Vol. III, pp. 46-47; Grasse, Vol. III, pp. 60-61). This so-called "level ride" was attributed to the parallel rule linkage system which is mentioned in each of the claims of Lugash '227. The trial court found that this level ride is a characteristic of the Lugash device [Finds. of Fact 6 and 22] and thereby allegedly distinguished from certain prior patents. The fact remains that **parallel linkage systems are old** as clearly shown by the Novotney patent and there certainly is no invention in substituting one type of lifting arm for another. But the fact also remains that defendant makes "Folda-Lift" loaders which employ ramping gate links [Exs. AE and AL] as well as non-ramping gate links and certainly the **ramping gate links do not produce the so-called "level ride"** platform and could not possibly be infringements.

Fundamentally the patent is invalid and could not be infringed; the limitations in the claims which also preclude infringement are being called to your Honor's attention for the purpose of emphasizing the errors compounded by the trial court.

EVIDENCE ESTABLISHES THAT PLAINTIFFS ARE GUILTY OF FALSE MARKING.

The trial court found [Find. of Fact 37] that

“Certain H-23 models of plaintiffs Tuk-a-Way’ loader did not employ the unitary construction required by the claims of patent ’196, yet carried the numbers of both patents.”

The evidence on this point was given by plaintiffs’ witness Lugash and was clear-cut.

“Q. On the H-23 models that you sell, do you attach to it a nameplate such as I hold in my hand, Exh. 30? A. Yes we do.

Q. That nameplate has both patent numbers on it involved in the suit, the ’227 patent and the ’196 patent. Is that right? A. Yes.

Q. And did you, your company, intend to indicate to the public that the ’196 patent protected and covered the Model H-23? Was that your intention? A. Our intent was to show that patents were issued to the company covering the Tuk-A-Way units.

Q. And covering specifically the H-23 Model, that is what I’m talking about. A. Yes.

* * *

“The Court: Did you arrange for the making of these decals on these plates with the patent numbers on them?

The Witness: Yes, I did.

* * *

“The Court: Do you know why it went on there? Do you know what the intent was by putting this plate on Model H-23?

The Witness: To publicize our patent numbers. We had been informed to show our patent numbers on the equipment and this is what we intended to do, show them." (Vol. III, pp. 305-307).

False marking is contra to 35 U.S.C. §292. Since false marking was clearly established the wrongful intent to deceive the public is presumed until the contrary appears.

"The presumption is, until the contrary appears, that the mark was placed on the article with the intention to deceive."

Krieger v. Colby, 106 F. Supp. 124 (D.C. S.D., Calif., 1952).

It may be noted that appellees' counsel represented the successful party in the *Krieger* case and are aware of this legal presumption.

The stated intent was to tell the public that the '196 patent covered the non-unitary models H-23. No evidence was presented by plaintiffs attempting to show that the mismarking was innocent, there was no evidence presented to show that the plaintiffs have discontinued the mismarking. Therefore the court's finding of innocent mismarking [Find. of Fact 38] is unsupported and contrary to the presumption of wrongful intent which was never rebutted.

It is submitted that Finding of Fact 38 is in error and is unsupported by the evidence. Conclusion of Law I is also in error.

CONCLUSION.

Lugash '227 has not added to the sum of useful knowledge in the load elevator art. It merely makes use of the existing fund of knowledge readily available to those skilled in the art who chose to avail themselves of the knowledge stored in the Patent Office record. The Novotney '403, Narvestad, Peters, Jester, Wood '135 and the other prior art patents found in Defendant's Exhibits C and D not considered by the Patent Office in issuing the Lugash '227 patent clearly demonstrate that each and every mechanical element of Lugash '227 is old, has been employed in the prior art in the same co-operative relationships to produce the same results and has become a part of the public domain freely available to all persons in this art. Lugash '227 and each of its claims in issue are invalid.

"He who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge."

Dow Chemical Co. v. Haliburton Oil Well Cementing Co., 324 U.S. 320, 328, 89 L. Ed. 973, 980, 64 U.S.P.Q. 412, 415 (1945).

The trial court's Conclusion of Law holding Lugash '227 patent valid, must be reversed, since that conclusion is not based upon facts which clearly advise this Court as to what was the unobvious, surprising and inventive result attained by the combination of old elements **defined by the claims.**

Similarly, the trial court's Conclusion that defendant infringed must be reversed, since the facts do not support such conclusion. It is not to the public interest to prevent the public from free, normal use of what is in the public domain.

Finally, the Conclusion that plaintiff was not guilty of mismarking should be reversed, since the evidence clearly establishes that the mismarking was purposeful and with the intent of impressing the public with non-existent patent protection.

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of

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SMITH,

Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

GUY PORTER SMITH,

APPENDIX A.

Pertinent Sections of Title 35, U.S.C.

§101. "Inventions patentable

Whoever invents or discovers any **new** and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. * * *

§102. "Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

- (a) the invention was known or used by others in this country, or **patented** or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
- (b) the invention was **patented** or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or * * *

§103. "Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the

subject matter as a whole would have been **obvious** at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. * * *

§112. "Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. * * *

§292. "False Marking

* * * Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word 'patent' or any word or number importing that the same is patented, for the purpose of deceiving the public; or * * *

* * * shall be fined not more than \$500 for every such offense.

- (b) Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States. July 19, 1952, c. 950, §1, 66 Stat. 814."

APPENDIX B.

Plaintiffs' Exhibits.

<u>Exh.</u>	<u>Description</u>	<u>Page Reference In Record (Vol. III) Received In Evid.</u>
1	Lugash patent in suit, No. 2,837,227	
2	Lugash patent in suit, No. 2,989,196	7
3	Assignment of patents in suit from Max J. Lugash to Maxon Industries, Inc.	8
4	"Folda-Lift" brochure of defendant	120
5	A one-fifth scale model of defendant's "Folda-Lift" device	131
5 A-D	Photos of Exh. 5 model	132
6	Plaintiffs' interrogatories (1 through 9 and Exh. A) and defendant's answers	8
7	Defendant's answers to plaintiffs' interrogatories 13, 19 and 20	8
8	Deposition of Milton C. Vogel	9
9	A "Folda-Lift" brochure of defendant	193
10	An advertisement of defendant's "Folda-Lift"	191
12	Defendant's drawing entitled "Installation Model 1500 'Folda-Lift' "	121
13	Defendant's drawing entitled "Double Folding Platform 1500 and 2000 DFL, Venco 'Folda-Lift' "	193
15	Defendant's drawing entitled "Installation Power Platform Unfolding"	121
16	Defendant's drawing entitled "PTO Installation"	173
17	Page from defendant's "Folda-Lift" manual having schematic diagram of hydraulic system	173
18	A set of Polaroid photographs of defendant's "Folda-Lift" device	181
19	A set of photographs of defendant's "Folda-Lift" device with DFL platform	196
20	Chart of defendant's sales	198
21	Advertising pamphlets showing plaintiffs' "Tuk-A-Way"	302
22	Chart of sales of plaintiffs' "Tuk-A-Way" devices	293
27	Defendant's drawing No. 11772, Double Folding Platform	195
30	"Tuk-A-Way" nameplate	302
32	Toy Truck	47

Defendant's Exhibits.

<u>Exh.</u>	<u>Description</u>	<u>Page Reference In Record (Vol. III) Received In Evid.</u>
A	Certified copy of file history of Lugash Patent No. 2,837,227	623
B	Certified copy of file history of Lugash Patent No. 2,989,196	691
C	Defendant's Prior Art Exhibit Book	703
D	Defendant's Prior Art Exhibit Book	703
E-G	Brochure, Daybrook Power Gates	403
E-V	Brochure, "Tuk-A-Way" Electric Hydraulic Lift	490
F	Original drawing of Milton C. Vogel dated 12-23-47	360
G	Original drawing of Milton C. Vogel dated 12-23-47 and marked Fig. 2	360
H	Blueprint of drawings of Milton C. Vogel	361
I	Certified copy of Vogel patent application Serial No. 13,688 filed March 8, 1948 entitled "Truck Elevator"	369
J	Venco brochure entitled "Venco Electric Power Tailgate Loader" dated 4/56	378
K	Venco brochure "Model 30" tailgate loader	348
L	Venco brochure "Model 300" tailgate loader	378
M	Copy of Vogel Patent No. 2,820,554 entitled "Tail Gate Lift for a Vehicle"	384
N	Drawing No. 01080, The Ven Corp., entitled "Venco EB-1000" dated 1-21-57	420
O	Drawing No. 01092, The Ven Corp., entitled "EB-1000 Venco Loader" dated 2-12-57	420
P	Print 01121, The Ven Corp., entitled "EB-1000 Loader" dated 7-19-57	420
Q	Brochure "Model EB-1000" Venco Tailgate Loader	423
R	Drawing No. 01141, Santa Anita Mfg. Corp., entitled "Tail Gate Assembly EB-1200 Loader" dated 12-24-57	429
S	Brochure "EB Series Venco Loader" File L, dated 6-24-57	429
T	Brochure "EB-1200 Venco Loader" File L, dated 7-1-57	429
U	Drawing, The Ven Corp., entitled "Pivoted Arm Type Loader, Hydraulically Operated" dated 7-25-58	420

V	Venco brochure "Model EB-1500"	432
W	Venco brochure "Model EB-1500"	432
X	Tailgate Loader "Model EB-1500" form EB-15-6101	432
Y	Brochure, reprinted from Hildy's 1961 Ford Blue Book, Venco "A Lift for Every Job"	450
Z	Brochure, Venco "A Lift for Every Job" form TW-6210	450
AB	Brochure, "Galion Loadlevator Hydraulic End-Loaders" copyright 1955	389
AC	Brochure, "Anthony Lift Gate"	409
AD	Brochure, Anthony "Drop Leaf—Lift Gate"	76
AE	Drawing 01086, Santa Anita Mfg. Corp., entitled "Ramping Gate Link" dated 12-30-59	437
AF	Drawing 01104, The Ven Corp., entitled "Lower Arm" dated 9-15-59	437
AG	Drawing 01105-1, The Ven Corp., entitled "Upper Arms" dated 9-14-59	437
AH	Drawing 01081, The Ven Corp., entitled "Main Pivot Block" dated 7-27-59	437
AI	Drawing No. 11287, Santa Anita Mfg. Corp., entitled "Main Pivot Block" dated 12-30-59	440
AJ	Drawing No. 11327, Santa Anita Mfg. Corp., entitled "Gate Link Non-Ramping" dated 3-2-60	440
AK	Drawing No. 01266, Santa Anita Mfg. Corp., entitled "Upper Arm" dated 6-29-60	440
AL	Drawing No. 11286, Santa Anita Mfg. Corp., entitled "Ramping Gate Link" dated 12-30-59	440

<u>AM</u>	<u>Claims</u>	<u>Prior Art</u>	
AM-1	1, 2 & 4	Novotney '403	710
AM-2	8, 9 & 11	Novotney '403	713
AM-3	1	Narvestad	717
AM-4	8	Narvestad	718
AM-5	1, 2 & 4	Narvestad & Wood '135	722
AM-6	8, 9 & 11	Narvestad & Wood '135	724

<u>AN</u>	<u>Claims</u>	<u>Prior Art</u>	
	AN-1 1	Lugash '227, Claim 7	
	2	Wood '540	742
	AN-2 1	Novotney '403 & Messick	
	2	Messick	747
	AN 3 1	Novotney '403 & Wachter	
	2	Wood	753
	AN-4 4	Lugash '227, Claim 2 & Messick	753
	AN-5 4	Lugash '227, Claim 7 & Wood '540	753
	AN-6 4	Messick & Narvestad	753
	AN-7 6	Lugash '227, Claim 5 & Wood '540	753
	AN-8 6	Lugash '227, Claim 5 & Spitler	753
	AN-9 6	Messick	753
	AN-10 6	Wood '540	753
	AN-11 6	Vogel & Spitler	753
AO	AO-1 Shadbolt		629
	AO-2 Ducondu '011		629
	AO-3 Jester		703
	AO-4 Peters		703
	AO-5 Narvestad		691
	AO-6 Novotney '403		702
	AO-7 Messick, Sheet 1		727
	AO-8 Messick, Sheet 2		727
	AO-9 Messick, Sheet 3		727
AP	Drawing No. 11915, Santa Anita Mfg. Corp., Model 1500 FL Venco "Folda-Lift", dated 2-4-65		472
AQ	Drawing No. 11389, Santa Anita Mfg. Corp., entitled "Platform" dated 5-15-61		472
AR	Drawing No. 11292, Santa Anita Mfg. Corp., entitled "Hydraulic Cylinder" dated 1-15-60		472
AS	Sketches of Milton Vogel		465
AT	Watson "Hide-A-Gate" brochure		465
AW	"Answers to Defendant's Further Interrogatories 40-49" dated October 4, 1963		867
AY	"Answers to Defendant's Request for Admissions" Nos. 1-23 dated August 12, 1963		867

"This invention more particularly rear end of a mo loads from ground and vice versa.

2 Sheets-Sheet 1

Fig. 1.

The principal of vide a load elevat to the rear end o operable to lift o level of the truck

Another object a device of the a folded up or col when not in use. lines 15-25].

'227 As

"New claims 1 These claims are tail to the folding This has proved ing point and has able by the allow the complete abs cited art." [Pate p. 24].

"When not in beneath the truck fere with normal tions." (Col. 5, li

"Q. Just to s understand your Way is there whe when you don't r (Vol. III, p. 33)

"It seemed fr have stated that and that is, it is tl you don't need it man, Vol. III, pp.

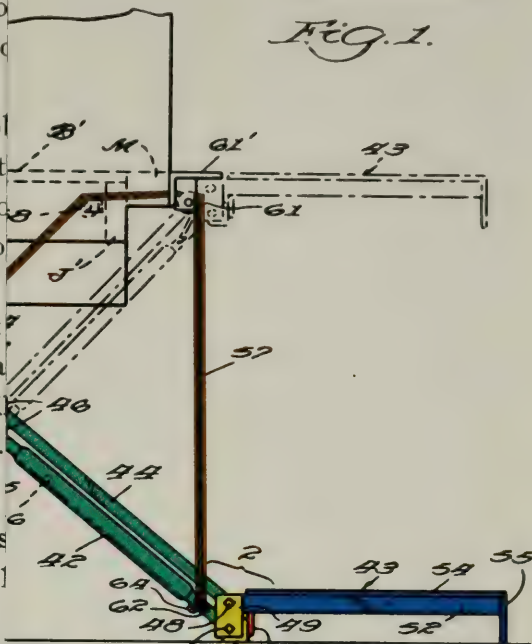
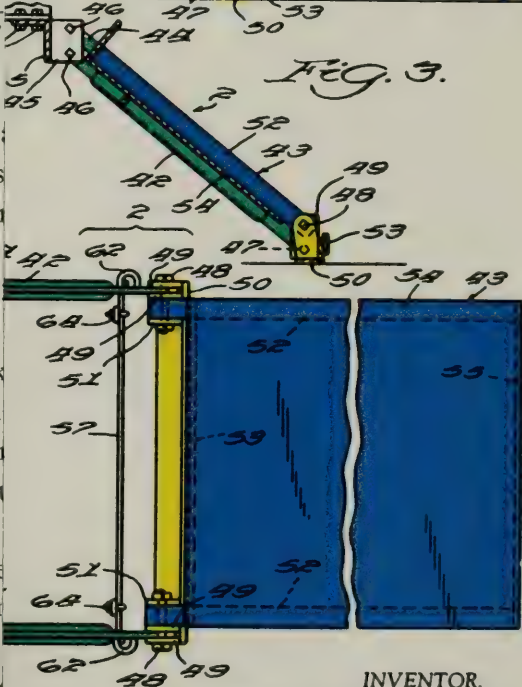


Fig. 3.



INVENTOR.

Max J. Lugash.

BY

Harold J. Desmonte
Atty.

<u>AN</u>	<u>Claims</u>	<u>Prior Art</u>	
AN-1	1	Lugash '227, Claim 7	
	2	Wood '540	742
AN-2	1	Novotney '403 & Messick	
	2	Messick	747
AN 3	1	Novotney '403 & Wachter	
	2	Wood	753
AN-4	4	Lugash '227, Claim 2 & Messick	753
AN-5	4	Lugash '227, Claim 7 & Wood '540	753
AN-6	4	Messick & Narvestad	753
AN-7	6	Lugash '227, Claim 5 & Wood '540	753
AN-8	6	Lugash '227, Claim 5 & Spitler	753
AN-9	6	Messick	753
AN-10	6	Wood '540	753
AN-11	6	Vogel & Spitler	753
AO	AO-1	Shadbolt	629
	AO-2	Ducondu '011	629
	AO-3	Jester	703
	AO-4	Peters	703
	AO-5	Narvestad	691
	AO-6	Novotney '403	702
	AO-7	Messick, Sheet 1	727
	AO-8	Messick, Sheet 2	727
	AO-9	Messick, Sheet 3	727
AP	Drawing No. 11915, Santa Anita Mfg. Corp., Model 1500 FL Venco "Folda-Lift", dated 2-4-65		472
AQ	Drawing No. 11389, Santa Anita Mfg. Corp., entitled "Platform" dated 5-15-61		472
AR	Drawing No. 11292, Santa Anita Mfg. Corp., entitled "Hydraulic Cylinder" dated 1-15-60		472
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AW	"Answers to Defendant's Further Interrogatories 40-49" dated October 4, 1963		867
AY	"Answers to Defendant's Request for Admissions" Nos. 1-23 dated August 12, 1963		867

"This invention relates to hoisting devices and more particularly to devices attachable to the rear end of a motor truck and operable to lift loads from ground level to level of the truck bed and vice versa.

The principal object of the invention is to provide a load elevating means which is attachable to the rear end of a truck frame and which is operable to lift or lower a load relative to the level of the truck bed.

Another object of the invention is to provide a device of the above character which may be folded up or collapsed beneath the truck bed when not in use." ['227 Patent, Ex. 1, Col. 1, lines 15-25].

'227 Asserted Novelty.

"New claims 11 through 14 are presented. These claims are all directed in more or less detail to the folding up aspect of the lifting device. This has proved to be the most valuable selling point and has been indicated as being patentable by the allowance of claims 4 and 10 and by the complete absence of this feature from the cited art." [Patent Office File History, Ex. A, p. 24].

'227 Results.

"When not in use, it is effectively concealed beneath the truck body and thus does not interfere with normal loading and unloading operations." (Col. 5, lines 22-24)

"Q. Just to summarize, Mr. Massman, do I understand your testimony to say that Tuk-A-Way is there when you need it, but it isn't there when you don't need it? A. That is correct." (Vol. III, p. 33)

"It seemed from what the other witnesses have stated that it would be the same for me, and that is, it is there when you need it and when you don't need it, it is not in the way." (Goodman, Vol. III, pp. 71-73)

June 3, 1958

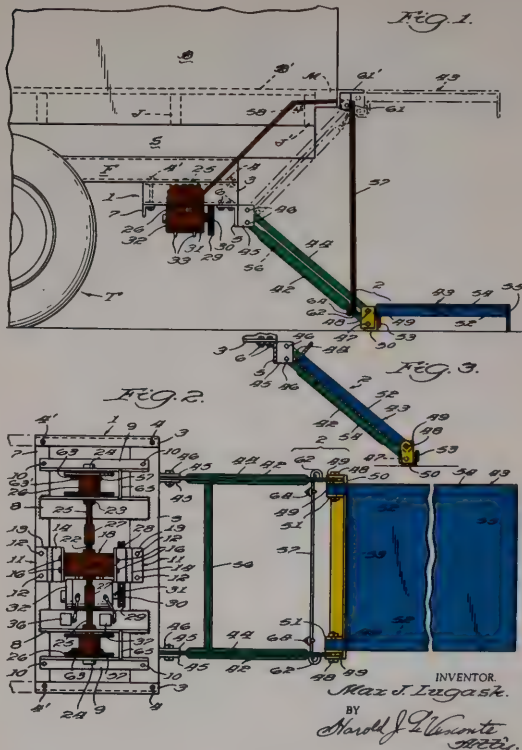
M. J. LUGASH

2,837,227

LOAD ELEVATOR FOR MOTOR TRUCKS

Filed April 15, 1957

2 Sheets-Sheet 1



<u>AN</u>	<u>Claims</u>	<u>Prior Art</u>	
	AN-1	1	Lugash '227, Claim 7
		2	Wood '540 742
	AN-2	1	Novotney '403 & Messick
		2	Messick 747
	AN 3	1	Novotney '403 & Wachter
		2	Wood 753
	AN-4	4	Lugash '227, Claim 2 & Messick 753
	AN-5	4	Lugash '227, Claim 7 & Wood '540 753
	AN-6	4	Messick & Narvestad 753
	AN-7	6	Lugash '227, Claim 5 & Wood '540 753
	AN-8	6	Lugash '227, Claim 5 & Spitler 753
	AN-9	6	Messick 753
	AN-10	6	Wood '540 753
	AN-11	6	Vogel & Spitler 753
AO	AO-1	Shadbolt	629
	AO-2	Ducondu '011	629
	AO-3	Jester	703
	AO-4	Peters	703
	AO-5	Narvestad	691
	AO-6	Novotney '403	702
	AO-7	Messick, Sheet 1	727
	AO-8	Messick, Sheet 2	727
	AO-9	Messick, Sheet 3	727
AP	Drawing No. 11915, Santa Anita Mfg. Corp., Model 1500 FL Venco "Folda-Lift", dated 2-4-65		472
AQ	Drawing No. 11389, Santa Anita Mfg. Corp., entitled "Platform" dated 5-15-61		472
AR	Drawing No. 11292, Santa Anita Mfg. Corp., entitled "Hydraulic Cylinder" dated 1-15-60		472
AS	Sketches of Milton Vogel		465
AT	Watson "Hide-A-Gate" brochure		465
AW	"Answers to Defendant's Further Interrogatories 40-49" dated October 4, 1963		867
AY	"Answers to Defendant's Request for Admissions" Nos. 1-23 dated August 12, 1963		867

Narvestad Objects.

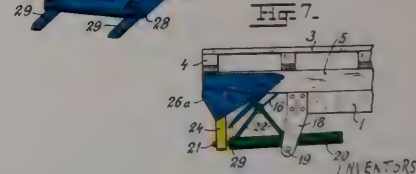
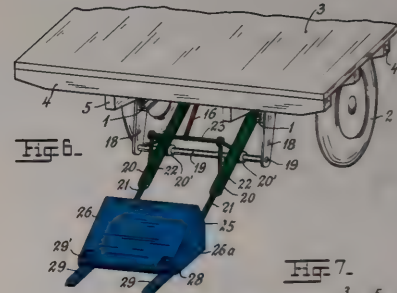
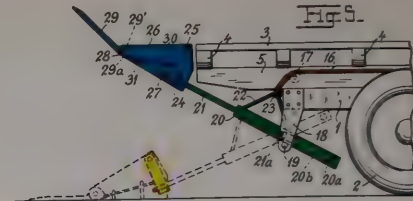
"This invention relates to loading apparatus for use on trucks and other goods transporting road vehicles and in particular relates to the class of loading apparatus embodying a load receiving support carried by a structure so articulated to the vehicle body that by a power or manually actuated driver the said structure can move the load receiving support into alignment with the floor of the vehicle and maintain it in such position during a loading or unloading operation, and also lower the support to a position close to the road or other surface on which the vehicle stands for the purpose of receiving or discharging a load at about road level." (Narvestad, Col. 1, lines 1-14)

"A still further object of the invention is to provide loading apparatus which is **collapsible or foldable** beneath the vehicle body **when out of use** and which, . . ." (Col. 1, lines 54-57)

Narvestad Result.

"When the apparatus is not in use it can be stowed away beneath the floor 3 by turning the platform upside down about the pivot 25 as shown in Figure 7 and pressing the rods 21 home in the tubes 20, the arms 29 folding close against the platform plate 26." (Col. 5, lines 63-69)

Narvestad states objects and produces results identical to and anticipating of Lugash '227. Its loader is also "there when you need it, but it isn't there when you don't need it."



<u>AN</u>	<u>Claims</u>	<u>Prior Art</u>	
	AN-1 1	Lugash '227, Claim 7	
	2	Wood '540	742
	AN-2 1	Novotney '403 & Messick	
	2	Messick	747
	AN 3 1	Novotney '403 & Wachter	
	2	Wood	753
	AN-4 4	Lugash '227, Claim 2 & Messick	753
	AN-5 4	Lugash '227, Claim 7 & Wood '540	753
	AN-6 4	Messick & Narvestad	753
	AN-7 6	Lugash '227, Claim 5 & Wood '540	753
	AN-8 6	Lugash '227, Claim 5 & Spitler	753
	AN-9 6	Messick	753
	AN-10 6	Wood '540	753
	AN-11 6	Vogel & Spitler	753
AO	AO-1	Shadbolt	629
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	AO-3	Jester	703
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	AO-7	Messick, Sheet 1	727
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March 19, 1940.

F. A. NOVOTNEY

END GATE LOADER

Filed June 19, 1939

2,194,403

2 Sheets-Sheet 2

Fig. 3

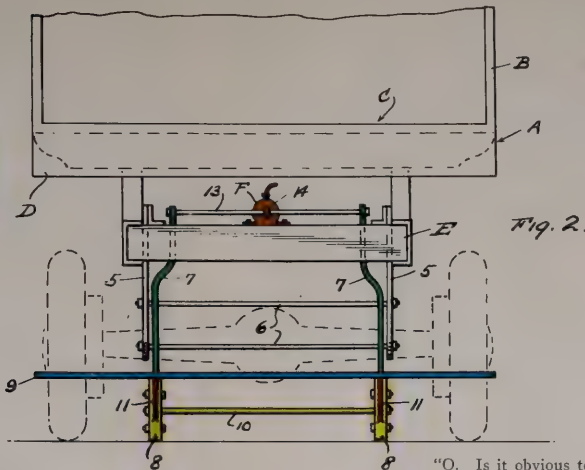


Fig. 2.

Inventors

Frank A. Novotney
L. B. James

Novotney '403 in View of Narvestad.

"Q. Now, do you find any teaching in the Narvestad, Jester or Peters patent which would make it obvious to you to move the Novotney platform 9 into an inverted position on the lifting arm 7 and place the platform in an out-of-the-way position beneath the vehicle bed? A. Certainly, the teaching in Narvestad, in Peters and in Jester, all three of those teach a platform being swung up and over so as to be on the linkage and it would be then under the truck bed. All you have to do is see that teaching and swing this platform 9 of Novotney '403 over and on top of the arm 7." (Gabriel, Vol. III, p. 701)

"Q. Is it obvious to you from the construction shown in the drawings of this Novotney patent that the platform 9 could be folded back until it hit the lifting arm 7? A. Yes.

Q. And further, if it were suggested to you to fold or collapse the platform under the vehicle bed, as in the Narvestad patent, 2,680,529, that we discussed previously, would that make it further obvious to you, you can fold or collapse the platform 9 of Novotney over the arm 7 when in the lowered position of Fig. 1, with no further modifications of any kind to the Novotney construction, so that the arm 7 would then be raised and the platform 9 would be positioned in an inverted position beneath the vehicle bed?

March 19, 1940.

F. A. NOVOTNEY

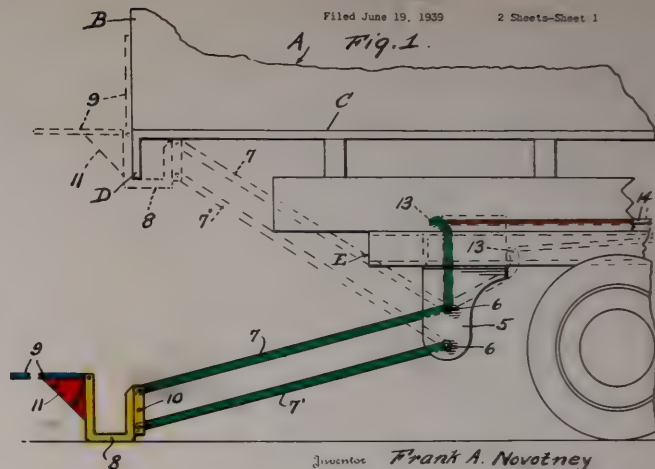
END GATE LOADER

Filed June 19, 1939

2,194,403

2 Sheets-Sheet 1

Fig. 1.



Inventors

Frank A. Novotney
L. B. James

The Witness: Yes." (Vogel, Vol. III, pp. 486-487)

This testimony of defendant's technical experts on the combined teachings of Narvestad and Novotney stands uncontradicted in the record.

The Trial Court found that the Novotney platform would fold:

"It is mechanically possible to invert the platform in the Novotney over the parallel linkage system in that device . . ." (Memorandum Opinion, Vol. III, p. 563)

" . . . it is mechanically possible to invert the platform in the said Novotney device . . ." (Find. of Fact, 16, Vol. III, p. 666).

No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MANUFACTURING CORPORATION,

Appellant and Cross-Appellee,

vs.

MAX J. LUGASH AND MAXON INDUSTRIES, INC.,

Appellees and Cross-Appellants.

Opening Brief of Cross-Appellants Max J. Lugash
and Maxon Industries, Inc.

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FILED

MAY 2 1967

WM. B. LUCK, CLERK

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I.

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The Lugash improvement patent is for a combi- nation that produces a result never achieved by any prior art. It is therefore no objection to the validity of the Lugash improvement patent that his earlier generic patent has the invertible platform feature in common. The court erred in concluding that because the folding concept was claimed in Lugash's generic patent it was of no patentable significance in his improvement patent and, also, in concluding that the im- provement patent merely incorporated the claims of the generic patent in combination with other disclosure of the prior art	22
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III.

Page

Finding of Fact 35 is contrary to the principle that the presumption of validity arising from the grant of a patent on a combination of old elements is not upset merely because the examiner failed to cite a reference disclosing one element during the prosecution of the application. Additionally, the presumption here is intact because the Examiner actually had the best prior art before him	31
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IV.

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No. 20267

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Opening Brief of Cross-Appellants Max J. Lugash
and Maxon Industries, Inc.

Jurisdictional Statement.

This is a patent case involving the questions of validity and infringement of Lugash generic Patent No. 2,837,227 and Lugash improvement patent No. 2,989,196. A judgment was entered on June 10, 1965, holding the Lugash generic patent valid and infringed, while the Lugash improvement patent was held invalid [R. 675]. The trial court made no findings on the issue of infringement of improvement patent '196 in view of the holding of invalidity. The main appeal is pursuant to defendant's Notice of Appeal, filed June 21, 1965 [R. 681], from those portions of the trial court's judgment holding the Lugash generic patent valid and infringed. Plaintiffs' have cross-appealed pursuant to a Notice of Appeal filed July 9, 1965 [R. 704], from that portion of the judgment holding the Lugash improvement patent invalid. Therefore, this brief is limited to

the sole issue of the cross-appeal, *i.e.*, validity of Lugash improvement patent '196.

The District Court had jurisdiction under 28 U.S.C. Secs. 1338(a) and 2201 and this Court of Appeals has jurisdiction under 28 U.S.C. 291.

Concise Statement of the Case.

Max J. Lugash filed a complaint in the District Court charging Santa Anita Manufacturing Corporation with infringement of two patents [R. 2]. He sought an injunction and damages. Santa Anita answered, denying generally these charges and affirmatively alleged the usual defenses. In addition, Santa Anita counter-claimed for a declaratory judgment of non-infringement and invalidity of the two patents [R. 5]. Because the two patents in suit had been assigned to Maxon Industries, Inc., that corporation was joined as a party-plaintiff in the action by an order of the Court [R. 185].*

The case was tried to the court sitting without a jury. While Lugash generic patent '227 was adjudged to be valid and infringed, the court made Findings 31-35a [R. 671, 672] to the effect that Lugash improvement patent '196, which was co-pending in the Patent Office with generic patent '227, was an obvious variant of the claimed subject matter of the generic patent and invalid under 35 U.S.C. Sec. 103. The nature of the prior art (including the claimed subject matter of the generic patent), the Lugash improvement patent, and the differences between them are set out below, as a preliminary to argument.

*Throughout this Brief, the District Court Clerk's record on appeal will be referred to as "R" followed by the page number. The reporter's transcript of evidence on the trial before Judge Crary will be referred to as "Tr." followed by page and line numbers, to wit: Tr., lines -----.-----

A. The Art Prior to Lugash Improvement Patent '196.

This case is concerned with freight loading and unloading devices for trucks. As is shown by the relatively primitive devices of the 1896 Shadbolt patent, the 1921 Ducondu '011 and 1927 Ducondu '473 [Ex. D; Find. 23, R. 668, lines 11-13], freight loading devices have been known for well over half a century. Speaking generally, such devices historically have taken the form of laterally spaced lifting arms pivotally connected at one end to the truck and having a platform or other load supporting members connected to the vertically swingable ends of the lifting arms. Then, as the lifting arms are raised or lowered, usually by a power means, a load is lifted or lowered between the level of the truck bed and ground level.

While all prior art lifting devices fit within the above very comprehensive definition, they fall into distinctly different types. Thus, in one type [Ex. C, Narvestad, '529, Australian patent '577 to Peters, and Jester '243] the lifting arms are simple levers, without any link motion. As a consequence, loads which are lifted and lowered with this type of device change their angle with respect to the horizontal and are tipped very substantially. In other words, loaders of this type are not "level" loaders, in that the load receiving platform does not remain approximately horizontal or level because the lifting arms, acting as levers, cause the platform and load to tip or change angle, which is the desired result [Find. 23, R. 667, 668].

In another type of loader, the lifting arms comprise two laterally spaced pairs of parallel acting linkages to whose swingable ends the load platform is connected. In this type, the platform and the load thereon remain

substantially horizontal during raising and lowering as a function of the parallel acting linkages. In this type of loader, with parallel linkage lifting arms, the platform, in one instance only, also serves as a portion of the floor of the vehicle [to wit, Ex. D, Trotter patents '488 and '052, on which defendant does not rely, Tr. 849, lines 1-17]. Generically speaking, these may be called "lift gate" or "tail gate" loaders because the load platform rides in vertical position and serves as the tail gate of the truck on which the device is mounted when not used for loading [*e.g.*, Ex. C, Novotney '403, End Gate Loader of March 19, 1940; Find. 10, R. 665].

None of these prior art types of loading devices was of any commercial significance, except for the type known as lift gates, in which the load platform serves as the tail gate of the truck as well as the load platform [Find. 24, R. 668, line 29]. The lift gate type of loader is old and well known, a variety of commercial types having been in widespread use since about 1945, having been made by many long established companies [Find. 10, R. 665]. The defendant Santa Anita itself and its predecessors have been continuously engaged in the manufacture and sale of the lift gate type of loader since at least 1947 [Find. 11, R. 665].

In the art prior to Lugash generic patent '227, there was no loader that could be stored in an out-of-the-way position that had ever come into successful use in the trucking industry [Find. 8, R. 664, line 26] even though there was a demand and need for a lower loader, the platform of which folded and moved to a position so as to be carried underneath the bed of the truck [Find. 26, R. 669]. As regards the type of lifting device with lever-acting lifting arms, without any parallel mo-

tion, some of those patents disclose a folding of a platform or load members over the lifting lever arms [Find. 19, R. 667]. However, in all of these prior devices of the lever arm type, manual disassembly of parts or manual manipulation of parts is necessary after the platform has been manually inverted to effect movement of the inverted platform into and out of the stowed position [Find. 20, R. 667]. None of these paper patent devices suggested or showed any means whereby the lifting arms could act to carry or move an inverted platform into and out of stowed-away position [Find. 20, R. 667].

Thus, in the art prior to Lugash's generic patent, whether commercially available or merely patented, there was not available any truck-loader in which the lifting arms functioned to move an inverted platform into and out of the stored position [Find. 8, R. 664, line 19]. Further, the state of the art, whether commercially available or merely patented, was such that there was not available any power loader in which the load platform could be moved into and out of a stored position by a power means [Find. 8, R. 664, line 18].

Truck loaders embodying the inventions of the Lugash generic patent were the first loaders that could be stored in an out-of-the-way position ever to come into successful use in the trucking industry [Find. 9, R. 664, line 26]. For the first time there was available to the art a loader with a power means for moving the load platform into and out of a stored position [Find. 8, R. 664, line 18]. Commercial production commenced in early 1957 [Ex. E, p. 18] and the patented Lugash loaders are known in the trade as Tuk-A-Way loaders. The introduction of the Lugash '227 invention to

freight business resulted in significant economies of time and money to users and Tuk-A-Way loaders were widely adopted in the trade [Find. 28, R. 669]. Sales increased until for the calendar year 1964, plaintiff Maxon's sales of Tuk-A-Way loaders had risen to over one-half million dollars [Find 9, R. 665, line 4].

The application for the Lugash generic patent was filed April 15, 1957 [Ex. 1]. Two embodiments of the Lugash invention are disclosed, both at the rear end of a truck and differing primarily in the nature of the power means. In one embodiment, the power means comprises an electric motor driven winch and cable device having pulley attachments to the rear edge of the truck bed, as well as to the parallelogram linkage systems and to the framework supporting the electric motor. In the second embodiment, the power means comprises a pair of hydraulic cylinders extending between the truck sills and the parallelogram linkage system and not connected to the framework supporting the inner or forward ends of the linkage systems. Neither of the two embodiments illustrated in the first Lugash patent is a unitary truck loader since, in both embodiments, the power means for raising or lowering the platform has a separate means of support, other than the framework of the loader assembly which supports the inner or forward ends of the parallelogram linkage systems.

At the trial, the defendant contended (and plaintiffs agreed) that the Lugash generic patent constitutes prior art against the Lugash improvement patent to the extent, and only to the extent, of the claimed subject matter of the first Lugash patent. The trial court recognized that the patentable advance of Lugash's improvement patent would have to be over only what was

claimed in his copending generic patent and need not be over the totality of its disclosure as would be the case if the patents had not been copending [R. 570, lines 8-11]. The claims of Lugash patent '227 define new combinations of old elements, best summarized after claim 8, as consisting of a pair of parallel rule linkage systems, a platform, connections between the linkage systems and platform comprising hinged means permitting inversion of the platform and stop means to support the platform in load carrying position, and power means to lift the platform or to allow it to descend [Find. 7, R. 664].

B. The Differences Between the Lugash Improvement Patent and the Prior Art.

The application for the second Lugash patent was filed September 27, 1957, about eight months prior to issuance of the primary Lugash patent on June 3, 1958. The second patent specifically states that it relates to "an improvement over the hoist described and claimed in my application Serial No. 652,860 filed April 15, 1957, now Patent No. 2,837,227" [Ex. 2, Col. 1, lines 8-12]. While the Lugash generic patent disclosed two different embodiments of loader [*i.e.*, Ex. 1, Figs. 1 and 9], both of these are mounted on the rear end of the truck. As contrasted with this, the improvement patent disclosed but one embodiment of loader but discloses this one embodiment as being installed under three different locations relative to the truck. Thus, Figures 1 through 8 relate to the single disclosed embodiment of the invention as centrally located under the rear end of the truck while "Figs. 9 and 10 are views showing optional installations of the device in off center positions at the rear end of a truck and at the side of a truck respectively" [Ex. 2, Col. 1, lines 64-66].

A stated object of the invention is to provide a hoisting apparatus "in which the power means is mounted on the main frame member for the hoist, whereby the entire hoist and its power unit form a complete assembly or unit for attachment to the vehicle" [Ex. 2, Col. 1, lines 25-29] and it is further stated,

"It is to be noted that the power unit and control means except the valve 47 and switch 50 are mounted on the main frame member so that it forms a unit which can be applied to the truck in any desired location" [Ex. 2, Col. 4, lines 34-37].

At the trial, plaintiffs contended that patentability of the Lugash improvement patent was established by this totally new result, *i.e.*, a power loader comprising a unitary assembly attachable as a unit under the truck in any desired location [Tr. 154, line 13; 157, line 25; Résumé of testimony of plaintiffs' expert witness, R. 189, line 21, to 200, line 1 and 220, lines 15-19]. None of defendant's prior art patents, nor Lugash's generic patent, addresses itself to this objective. Defendant at no time contended that any prior art showed any power loader attachable under a truck as a unit at any desired location. Such a device attaining this result appears in evidence derived from defendant only in defendant's advertising for its infringing Folda-Lift device, in Exhibit 4. There, it is said of the Folda-Lift loader, "Ideal for unusual requirements such as mounting on side of body or on dump body." While such locations are not illustrated in defendant's advertising, they are illustrated in plaintiffs' advertising which shows side loaders and dump truck loaders mounted under trucks [Exs. 21a and b]. The trial court made no findings as to what the prior art was and what

Lugash did to improve upon it with specific reference to the feature of versatility of location of a truck loader.

Apart from the feature of versatility of possible location, the evidence also shows that Lugash was the first to achieve a unitary construction in a truck loader of the type having an invertable platform movable to and from an out-of-the-way position under the truck bed. It was admitted at the trial by defendant's patent expert that in making a load elevator like that of the first Lugash patent into a unitary construction, there is a problem in that in using a single hydraulic cylinder centrally located between the linkage systems, there is a requirement of the arrangement of the several parts in such a manner as to obtain the requisite clearance for the inversion of the platform [Tr. 824, line 24, to 826, line 6]. He also admitted on cross-examination that there were no prior art patents having elements combined in a manner to make a unitary loader in which the load platform is invertable over the lifting arms [Tr. 825, line 19, to 826, line 6]. The court did not make any findings that there was any single prior art patent showing Lugash's manner of combining elements in his secondary patent.

At the trial, defendant introduced evidence of prior art unitary *tail gate* loaders in patents and devices not considered by the Patent Office in issuing the Lugash improvement patent, on the basis of which the court found Lugash '196 to be an obvious variant of the claimed subject matter of generic Lugash patent '227 [Finds. 31-35a, R. 671, 672] and invalid under 35 U.S.C. 103 [R. 674, Concl. of Law G]. In making these findings and conclusions, the trial court held the invertable platform claimed in the Lugas generic pat-

ent, to be of no patentable significance as part of the combinations claimed in the Lugash improvement patent [R. 671, Find. 34]. However, apart from the primary Lugash patent, no art prior to the secondary Lugash patent shows a platform invertable over the linkage systems.

Specification of Errors.

1. The District Court erred in finding that the claims of the second Lugash Patent No. 2,989,196 merely incorporate the claims of the first Lugash Patent No. 2,837,227 in combination with other disclosures of prior art [Find. 34].

2. The District Court erred in finding that the prior art Messick Patent No. '923, Wood Patent No. '540 and defendant's prior models manufactured and sold before plaintiffs' filing of the application for the second Lugash Patent No. 2,989,196, made the unitary construction of the second Lugash Patent No. '196 obvious to one skilled in the art at the time of plaintiffs' invention [Find. 35].

3. The District Court erred in finding that the second Lugash Patent No. 2,989,196 is an obvious variant of the claimed subject matter of the first Lugash Patent No. 2,837,227 [Find. 35a].

4. The District Court erred in not finding that the second Lugash patent 2,989,196 combined elements in a manner which was not obvious, not anticipated and which obtained unexpected and advantageous results.

5. The District Court erred in not finding that the second Lugash Patent 2,989,196, as an improvement over the first Lugash Patent 2,837,227, for the first time disclosed to the art a unitary construction for a

load elevator for trucks having a platform that is invertible over the lifting linkages.

6. The District Court erred in not finding that the unitary device of the second Lugash Patent 2,989,196 for the first time gave the art a loading device for trucks attachable as a unit in any desired location under a truck and which eliminated both the problem of preserving the operating alignment of its own parts and the problem of mating alignment of a load platform with specially cut openings in the floor or side wall, or both, of a truck or vehicle.

7. The District Court erred in Conclusion of Law G in holding invalid the second Lugash Patent No. 2,989,196.

8. The District Court erred in not holding that defendant has infringed the second Lugash Patent No. 2,989,196 and in not awarding plaintiffs an injunction and accounting therefor.

Summary of Argument.

The essence of Lugash's improvement patent is a stowable power loader attachable as a unit anywhere under a truck. Essential to this end are certain elements of the combination claimed by him, *i.e.*, an invertible platform and the arrangement of the parts into a unitary assembly in such manner that clearance is afforded by the power means for inversion of the platform and subsequently raising the inverted platform and linkage systems to stowed position beneath the vehicle bed.

Manifestly, the achievement of such a loader is not obvious from prior unitary tail gates in which the biggest part, the platform, always projects beyond the vehicle bed, whether serving as a tail gate or load plat-

form, and whose devisers were not even concerned with the prospect of getting a large platform under a truck bed. Consequently, even if any prior tailgater had come up with an arrangement of the parts, other than the platform, which would meet the clearance problems of Lugash, such accidental result cannot be properly used as 20-20 hindsight to make obvious something not intended or appreciated by them.

Novelty is not in dispute—only obviousness. It is not contested that only the Lugash improvement patent attains this new result of a stowable power loader attachable as a unit anywhere under the truck. Now, this new result is attainable only because of the presence in the claims of those certain elements mentioned above but to which the trial court gave no weight, contrary to the principle that a claim to a combination is an entirety whose validity is to be tested as such.

The Lugash improvement claims, constituting a new combination of elements, old in themselves, but which produce a new and useful result, entitles him to the protection of his patent and the rule of *Lincoln Engineering* has no application to such a combination. The court erred in this respect, and also in applying the rule of *Lincoln Engineering* to the combination after subtracting elements from the combination claimed. Furthermore, if we concede that there was a prior conjunction or concert of the same elements as Lugash's combination, the Lugash combination is not rendered obvious, under the case law of this circuit, by such prior

association of the same elements because they did not produce substantially the same results.

Lugash's claims being to a combination, the fact that they include as an element the feature of an invertible platform, also an element of the claims of his prior generic patent, cannot detract from patentability of the improvement patent. It was error for the trial court to hold to the contrary, and an improper extension of the principle of the *Intricate Metals* case. This case is additionally distinguishable from *Intricate Metals* in that those certain elements of Lugash's combination claims mentioned above require the disclosure of a clearance arrangement which is contained and taught only in the improvement patent. The improvement patent is not merely a combination of the claimed subject matter in the generic patent and other disclosures of prior art. On the contrary, the attainment of Lugash's new result requires the perception of a problem and the provision of a solution for the problem which are disclosed only by the improvement patent.

ARGUMENT.

I.

The Lugash Improvement Patent Is a New Combination of Elements, Old in Themselves, Producing a New and Useful Result. It Was Error to Apply the Rule of Lincoln Engineering to Such New Combination.

Although the court made no findings on the point, it is clearly established in this record, by defendant's failure to contest the point, that no prior workers in this field ever addressed themselves to the objective of providing a power loader attachable as a unit under any location on a truck. By contrast, the Lugash improvement patent '196 discloses, in detail, a single embodiment of Lugash's unitary loader and illustrates it in three different positions under a truck. The patent expressly states that, "it forms a unit which can be applied to a truck in *any* desired location" [Ex. 2, Col. 4, lines 34-37] and "whether the hoist is mounted on the end or side of the vehicle, when not in use, it can be moved to a position where it is completely out of the way and in which it does not add to the width or length of the vehicle or interfere with the normal loading or unloading of the vehicle from loading docks or the like which are disposed at the level of the vehicle bed" [Ex. 2, Col. 4, lines 41-52]. Defendant advertises that its infringing Folda-Lift, which is unitary, as advertised, has such versatility of location [Ex. 4] which is all defendant has to say on the point, as follows:

"Simple to install unitized mechanism. Mounts directly to truck frame. Hydraulic unit is completely self-contained. Ideal for unusual requirements such as mounting on side of body or on dump body."

The claims of the Lugash improvement patent do not claim as his invention the individual parts; these claims are to a combination, the elements of which are old, but whose new relationship together for the first time achieves a power loader attachable as a unit to any desired position under a truck.

All prior loaders have a load platform, lifting arms, a supporting framework, and power means for raising and lowering the platform. In all of these, each of the parts performs its old functions, *i.e.*, the platform supports the load, the lifting arms raise and lower the platform, the framework provides a base for the device, and the power means raises and lowers the load. All are old and are applied to perform their old functions despite which the United States Patent Office has issued a large number of prior patents on power loaders because they combine these old parts into new and different combinations producing new and useful results. This is in recognition of the fundamental principle of patent law recently referred to by this court in quoting Professor Robinson's work on Patents as follows:

"While every element remains a unit, *retaining its own individuality and identity as a complete and operative means*, their combination embodies an entirely new idea of means, and thus becomes another unit, whose essential attributes depend on the cooperative union of the elements of which it is composed." (Emphasis added).

Pursche v. Atlas Scraper and Engineering Co.
(C.A. 9, 1962), 300 F. 2d 467, 473.

The passage just quoted goes on to say

"If the new combination accomplishes *results that could not have been achieved either by its in-*

dividual or collective elements, their union must inevitably have brought into action some new or yet unawakened energy, which constitutes a new and independent means.” (Emphasis added).

Pursche v. Atlas Scraper and Engineering Co.,
supra, page 474.

In this action, the defendant relied on some 27 prior art patents which used the same parts as the parts of the Lugash unitary loader, either individually or collectively. Yet, defendant didn't even contest, and the findings of fact do not detract from the fact that none of the prior patentees ever achieved the result of Lugash '196 in providing a power loader attachable as a unit *under any desired location* on the truck. Plaintiffs' evidence on this feature of Lugash and defendant's use of it [Tr. 154, line 13; 159, line 8] is unchallenged.

The Lugash improvement patent thus claims an entirely new combination that accomplishes results that were not previously achieved by its individual or collective elements. Under these circumstances:

“The rule in *Lincoln Engineering Co. of Illinois vs. Stewart-Warner Corp.*, 303 U.S. 545, 549, 58 S.Ct. 662, 664 82 L.Ed. 1008 (1938) that: ‘. . . the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination’ has no application. Rather, the correct principle is the one stated in *Expanded Metal Co. v. Bradford*, 214 U.S. 366, 381, 29 S.Ct. 652, 656, 53 L.Ed. 1034 (1909);

‘It is perfectly well settled that a new combination of elements, old in themselves, but which

produce a new and useful result, entitles the inventor to the protection of a patent.’ ”

Pursche v. Atlas Scraper and Engineering Co., supra, page 477.

Under the ruling of this court in *Pursche*, the District Court misapplied the rule in *Lincoln Engineering*. Evidently, the trial court was of the impression that the claims of the Lugash improvement patent defined mere aggregations instead of true combinations simply because the parts of the loader did not individually perform some new function in the unitary Lugash loader not previously performed by these old parts in the prior art. In the Lugash generic patent, these old parts did acquire new functions, results and modes of operation as a result of the combinations claimed therein, as established by the court’s Findings of Fact 6 through 30 [R. 663-670] and constituted a marked advance in the art [R. 673, Concl. of Law D]. It was abundantly clear that the rule in *Lincoln Engineering* could have no application to such a marked advance in the art where old parts were applied to perform new functions, attain new modes of operation, and produce new results. While a closer question was presented as to the applicability of *Lincoln Engineering* to the issue of obviousness or nonobviousness of the Lugash improvement patent, we submit that, consistent with the ruling in *Pursche*, the trial court misapplied the rule of *Lincoln Engineering* in holding the second Lugash patent invalid, and that Finding 33 [R. 671] is an insufficient basis for such holding because it ignores the new result achieved by Lugash’s novel combination.

Plaintiffs grant that lift gate loaders of a unitary construction, *i.e.*, the type of loader in which the load

platform also serves as the tail gate of the truck, were old and well known in the art, several patents to such unitary lift gate loaders having been issued. However, the *manner* in which Lugash combined the parts in his unitary loader was patentably distinct from the prior art unitary lift gate loaders for the reason that the combining of these parts in the environment of *an invertible platform loader* under a truck, involved clearance problems in arranging the power means, lifting linkages and platform in such a manner that the platform, when inverted, would not interfere with the operation of the power means [R. 533, 534, 541]. The claims of Patent '196 [Ex. 2] define Lugash's manner of arranging these several parts in this environment.

Claim 1, for example, calls for "power means including a motor and devices actuated by said motor and carried by said main frame member and connected to said linkage means at a point thereon *affording clearance* for movement of said platform to said inverted position". Claim 2 is dependent on claim 1 (claim 3 is not in issue). Claim 4 calls for "said cylinder and piston means in (*sic*—and) said platform being constructed and arranged *to prevent interference there between* when said platform is swung into inverted position." Claim 5 is dependent on claim 4.

At the trial, it was conceded by defendant's expert that none of the prior art patents even addressed themselves to the objective of making a unitary power loader with an invertible platform [Tr. 823, lines 10-15] and, even more specifically, that there was no prior art patent for any unitary loader with an invertible platform [Tr. 825, line 18, to 826, line 6]. The record shows that the court recognized that no prior patentee

ever devised a unitary construction for a truck loader having an invertable platform. This appears from the court's opinion [R. 569, lines 5-26] but was appraised as a distinction without a difference insofar as concerns the problem of unitary construction [Find. 33, R. 671]. In applying the rule of *Lincoln*, the court viewed this as the use of an old thing, *i.e.*, unitary construction, in new surroundings, *i.e.*, an invertable platform loader, but without creating any novel or unusual function for the individual elements of the combination. Thus, the trial court recognized the *novelty* of the combination of the claims of the Lugash improvement patent but dismissed the foldable platform feature from the claims and then concluded that the improvement patent is a combination of old elements, but only "insofar as concerns the unitary construction" [R. 569, line 14].

In brief, it would appear that the court applied the rule of *Lincoln Engineering* to less than all of the elements of the combinations claimed in the patent. Such interpretation of the court's opinion is consistent with Finding of Fact 35 which states, in substance, that noncited unitary loader constructions, all of the lift gate loader type, made the unitary construction of Lugash patent '196 obvious, in spite of the fact that none of this noncited art discloses or suggests the fold-over platform feature included as an element of the combination claims of Lugash patent '196.

As the trial court thus recognized that the combination or arrangement of parts claimed by the improvement patent was novel, the application of the rule of *Lincoln Engineering* was in error because of this court's decision in *Pursche*, as pointed out above. Additionally, there is error because the court thus treated the Lugash

invention as comprising something less than the totality of the elements set out in the claims, and applied the rule of *Lincoln Engineering* to that, rather than to the entirety of the combination.

This treatment of the claims was not correct because a combination patent covers the totality or entirety of the elements in the claim and no single element or group of elements which is less than the totality of the elements.

“Where a thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.”

Imhauser v. Beurk, 101 U.S. 647, 661, 25 L. Ed. 945 (1880).

Also see *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 5 L. Ed. 2d 592 (1961).

The trial court's opinion and Findings 33-35a [R. 671] discount the materiality of elements stated in Lugash's claims, *i.e.*, the invertible platform and the arrangement for clearance. In effect, the claims have

been interpreted as something less than the sum of the elements actually stated therein, contrary to the principle of *Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U.S. 477, 487, reversing C.C.A. 3. The Supreme Court has “frequently held that it is the claim which measures the grant to the patentee. See for example . . .”. *Graver v. Linde Co.*, 336 U.S. 271, 277. In claims for combinations, every element is material—courts cannot add to or subtract from the claim and cannot treat elements as immaterial. *Fay v. Cordesman*, 109 U.S. 408, 421; *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U.S. 399, 410; *Paper Bag Patent Case*, 210 U.S. 405, 419. In combination claims, all elements “must be regarded as material, leaving open only the question whether an omitted part is supplied by equivalent device or instrumentally.” *Fay v. Cordesman*, *supra*, page 42. By 35 U.S.C. Sec. 103, Congress required obviousness to be tested by measuring the invention “as a whole”. We submit that it is error to say, as did the trial court, that admitted distinctions, constituting elements of a combination claim, make no difference in considering the validity of a patented combination, particularly on a record where the patented combination for the first time gives the art a power loader attachable and stowable as a unit under any location on a truck. This completely new result can only be achieved because of the presence in the patented combination of those elements which the court treated as a distinction without a difference [Tr. 154, line 13; 159, line 8].

II.

The Lugash Improvement Patent Is for a Combination That Produces a Result Never Achieved by Any Prior Art. It Is Therefore No Objection to the Validity of the Lugash Improvement Patent That His Earlier Generic Patent Has the Invertible Platform Feature in Common. The Court Erred in Concluding That Because the Folding Concept Was Claimed in Lugash's Generic Patent It Was of No Patentable Significance in His Improvement Patent and, Also, in Concluding That the Improvement Patent Merely Incorporated the Claims of the Generic Patent in Combination With Other Disclosure of the Prior Art.

The Lugash improvement patent for the first time provided the art with a power loader of the fold-a-way platform type, having the parts arranged in a unitary structure for attachment as a unit. To accomplish this result required more than the mere application of unitary lift gate loader principles to the invertible platform arrangement claimed by Lugash's generic patent. The accomplishment of this result additionally required perception of a problem which had never existed in the art before and the devising of an arrangement of the parts to accomplish the result. The fact that viewed after the event [as in Find. 33, R. 671] the means of solving the problem appeared simple and obvious does not negative patentability *Goodyear v. Ray-O-Vac*, 321 U.S. 275, 279, 64 S.Ct. 593, 594, 595, particularly where the problem was not before known *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 361 U.S. 45, 68, 43 S. Ct. 322, 330.

Defendant's patent expert conceded that no prior patent was addressed to the problem of providing a unitary loader having a platform of the fold-a-way type [Tr. 823, lines 10-15], and that there were no prior art patents having elements combined in a manner to make a unitary loader in which the load platform is invertible [Tr. 825, line 19, to 826, line 6]. It is thus established that Lugash achieved a novel combining or arranging of the parts. It was further admitted that this novel arrangement presented a clearance problem in the relationship of the parts when the platform was in inverted position [Tr. 824, line 24, to 825, line 10]. While defendant's patent expert and president gave voluminous testimony of noncited prior unitary tail gate loaders, whose gates cannot invert, from which they said Lugash's unitary construction was obvious, they nowhere gave any testimony that any such lift gate had the parts arranged in a manner to permit inversion of a load platform without interfering with the hydraulic cylinder and to subsequently permit raising an inverted platform to a tucked away position under the truck bed.

Simple as the problem may appear, in retrospect, defendant gave no evidence of any prior arrangement of parts to meet the specific problem. The best defendant's expert could do was to point to a notch in the *forward* edge of the platform of Wood '545, Fig. 9 [Ex. D] to provide clearance for the connection of the *lifting arms* to the platform for moving the platform to tail gate position [Tr. 661, lines 1-13]. But Lugash is concerned with clearance of the inverted platform and cylinder [Tr. 658, line 9; 660, line 10]. The notch of Wood '545 is in the wrong edge of the platform for this purpose. Defendant's president admitted that the

infringing Folda-Lift has a platform, in one model, with a notch in the *rear* edge of the platform for the purpose of inverting the platform over the linkage systems [Ex. E, p. 98, lines 9-12] and the cylinder is arranged in such position as to offer no interference to the platform's assuming the inverted portion [Ex. E, p. 139, lines 5-14].

To provide a unitary loader of the Fold-a-way platform type required a disclosure which can only be found in the specification and claims of the Lugash improvement patent which, in this record, is the only disclosure of an arrangement of the parts of a power loader, in an admittedly novel combination, to achieve an admittedly novel result. Thus, this case is very clearly distinguishable from this court's decision in *Intricate Metal Products, Inc. v. Schneider*, 324 F. 2d 555, in which claimed subject matter of an earlier patent was incorporated *only* with other disclosures of prior art *without* accomplishing any new use, function or result. We submit that it was error for the trial court to apply *Intricate* to the facts of this case.

Lugash did more than provide the art with its first unitary loader having a fold over platform. The Lugash improvement patent for the first time discloses to the art the conception and reduction to practice of a stowable power loader attachable as a unit to any desired location under a truck. While Lugash's generic patent discloses and claims the first successful invertible platform loader, it clearly does not address itself specifically to the provision of a power loader attachable anywhere under a truck.

The other prior art (*i.e.*, apart from the claims of the generic Lugash patent) upon which the defendant and

trial court rely, betrays no consciousness of the possibility of making a power loader attachable as a unit to any place under the truck. Defendant at no time contested the fact that the Lugash improvement patent is the first such disclosure in this art. Under these circumstances, it clearly cannot be obvious from the prior art unitary tail gates to provide the art with a power loader attachable as a unit to any place under a truck. This is true even though the unitary tail gate loaders are devices containing the same elements as the unitary Lugash loader because, consistent with the ruling of this court in *International Manufacturing Co. v. Landon, Inc.*, 336 F. 2d 723, at 726, the Lugash combination “is not anticipated or rendered obvious by a prior conjunction or concert of the same elements unless the latter produces substantially the same results”.

The Lugash improvement patent is directed to a wholly different object from that of the prior art. He sought a stowable power loader unit attachable anywhere under a truck. The prior art workers in the field made lift gates into a unitary structure, attachable only to the rear of the truck where, as defendant acknowledges, truck frames are relatively standard and where loaders can be easily standardized [Tr. 383, lines 2-18]. They were concerned with tail gate platforms, not invertible platforms. They were not concerned with getting a large platform under the truck, let alone the arrangement of the parts to get clearance for inversion and then hoisting the platform, lifting linkages and cylinder under the truck bed, all in a unitary assembly attachable anywhere under the truck.

The Lugash invention is not merely in making a unitary loader of the type first exemplified by his generic

patent—it was the conception of a new object to be achieved, the discovery of a clearance problem never before encountered in the art or even known to the art, and the successful solution of the problem to achieve the new result. Under the principles of *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 U.S. 45, 66-69, 43 S. Ct. 322, 329, 330, such an invention is not anticipated or rendered obvious on the basis of prior art which devised unitary lift gates simply for the purpose of making them unitary and in a tail gate environment where they did not have to overcome and were not even aware of the clearance problems involved in devising a relationship of parts which would successfully result in a stowable unitary loader attachable at any point under a truck.

“In the first place, we find no evidence that any pitch of the wire, used before Eibel, had brought about such a result as that sought by him, and, in the second place, if it had done so under unusual conditions, accidental results, not intended and not appreciated, do not constitute anticipation.”

Eibel Process Co., supra, 43 S. Ct. 329.

The defendant contended below and the court agreed in its findings and conclusions of law, that as unitary tail gate loaders were known to the art, the necessary effect of that would be to achieve the result of Lugash's improvement patent when a skilled worker was made aware of the generic invention of the primary Lugash patent. Under the ruling in *Eibel Process, supra*, it should be a complete answer to this contention that, in the first place, no unitary device used before the Lugash improvement patent had ever brought about the result sought by Lugash in his improvement; and in the second

place, even if any prior unitary lift gate loader accidentally had an arrangement of the parts capable of achieving the merely unitary result of the Lugash improvement patent, if used in combination with the claimed invertible platform of the generic Lugash patent, that fact could not anticipate or make obvious Lugash's achievement of the first stowable power loader attachable as a unit to any place under a truck. That result clearly is intended and appreciated only in the Lugash improvement patent.

From the foregoing, it is clear that the Lugash improvement patent is not merely a combination of his prior claimed subject matter of his generic patent with disclosures of other prior art. On the contrary, what was required is disclosed only in the Lugash improvement patent itself. First, the guiding concept of a power loader attachable as a unit to any place under a truck and secondly, the disclosure of a means adapted and intended for overcoming a clearance problem in making the first unitary loader of the type having a fold-a-way platform. It is respectfully submitted that Findings of Fact 34 to 35a are clearly erroneous in misapplying the principle of *Intricate Metal* to the facts of this record.

There was also error in the District Court's extension of the *Intricate Metal* case to hold that the invertible platform elements of the prior generic patent claims of Lugash, also present in the improvement patent claims, could not be of patentable significance in the latter. The court so found in Finding of Fact 34 [R. 671]. The *Intricate* case does not sustain any such proposition or finding of fact. In *Intricate*, this court considered the combination claims as an entirety—not the combination claims minus the elements thereof also present

in the prior patent. It is never an objection to an improvement patent that an earlier generic patent has covered the same structure, and such is valid, though taken out by a single inventor. *Traitel Marble Co. v. Hungerford Brass & Copper Co.* (C.A. 2, 1927), 22 F. 2d 259, 262.

“It is said, however, that this alleged improvement is not new, and is embraced in his former specification; and that if some portion of it is new, it is not so described as to distinguish the new from the old.

“. . . All that we think is useful or necessary to say is, that, after a careful examination of the patents, we think the objection on this ground is not tenable. The force of the objection is mainly directed upon the receiving magnet, which it is said is a part of the machinery of the first patent, and performs the same office. But the receiving magnet is not of itself claimed as a new invention. It is claimed as a part of a new combination or arrangement to produce a new result. And this combination does produce a new and useful result for, by this new combination, and the arrangement and position of the receiving magnet, the local and independent circuit is opened by the electric or galvanic current, as it passes on the main line, without interrupting it in its course; and the intelligence it conveys is recorded almost at the same moment at the end of the line of the telegraph, and at the different local offices on its way. And it hardly needs a model or a minute examination of the machinery to be satisfied that a telegraph which prints the in-

telligence it conveys at different places, by means of the current, as it passes along on the main line, must necessarily require a different combination and arrangement of powers from the one that prints only at the end. *The elements which comprise it may all have been used in the former invention; but it is evident that their arrangement and combination must be different to produce this new effect.* The new patent for the local circuits was therefore properly granted; and we perceive no well founded objection to the specification or claim contained in the re-issued patent of 1848.”

O'Reilly et al. v. Morse et al., 15 How. 62, 122, 123, 14 L. Ed. 601 (Emphasis added).

We submit that the *Morse* decision above quoted is of controlling effect in this situation. The invertible platform feature is a part of the machinery of the generic Lugash patent and it is also a part of the machinery of the improvement patent. In the improvement patent, it is claimed as a *part* of a new combination or arrangement to produce a new result and it does produce a new and useful result. There is no prior power loader attachable as a unit to any location under a truck and such new combination producing new and useful results should be sustained, rather than defeated by subtracting elements from the combination claimed. Clearly, such a combination cannot be rendered obvious by a prior conjunction or concert of the same elements not producing substantially the same results. *Interna-*

tional Manufacturing Co., Inc. v. Landon, Inc., supra, page 726.

“It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements.”

Hailes v. Van Wormer, 87 U.S. 353, 368 (1873).

As has been demonstrated, the improvement patent produces new and useful results even though all the constituents of the combination were known and in common use before the combination was made. Further, the results are the product of the combination rather than a mere aggregate of several results. Unitary constructions for prior loaders never achieved any versatility of possible point of attachment under a truck. The invention claimed by Lugash in his primary patent did not reach the result. It is only the Lugash improvement patent which achieves the result of a power loader attachable as a unit under any desired location on a truck.

III.

Finding of Fact 35 Is Contrary to the Principle That the Presumption of Validity Arising From the Grant of a Patent on a Combination of Old Elements Is Not Upset Merely Because the Examiner Failed to Cite a Reference Disclosing One Element During the Prosecution of the Application. Additionally, the Presumption Here Is Intact Because the Examiner Actually Had the Best Prior Art Before Him.

Finding of Fact 35 is to the effect that certain non-cited art made the unitary construction of Lugash's improvement patent obvious. We have already pointed out wherein this finding is clearly erroneous in that the non-cited prior art relied on does not disclose those elements of the claims in issue defining the invertible platform feature. It should not require additional citation of authority to demonstrate the proposition that elements of a claimed combination cannot be made obvious from prior art, none of which even remotely suggests those elements. By the same token, as regards the presumption of validity of the Lugash improvement patent, as none of the non-cited art mentioned in Finding 35 discloses the invertible platform feature, they cannot detract from the presumption of validity under the holding of this court in *Wham-O Manufacturing Co. v. Paradise Manufacturing Co.* (C.A. 9, 1964), 325 F. 2d 748.

The trial court felt that the non-cited art mentioned in Finding 35 was more pertinent than that considered by the Examiner in the Patent Office simply because Messick '923, Wood '540, and the defendant's prior models mentioned therein all have the feature of mounting the complete power system on a main supporting

framework. Specifically, in the cases of Messick and Wood '540, they mount the pump, motor and reservoir on the main framework, along with the hydraulic cylinder. On the other hand, while the patents cited in the Lugash improvement patent showed the arrangement of mounting the hydraulic cylinder on a main frame member, they did not disclose a reservoir, pump and motor as also being mounted on the main frame member. It is in this respect that the trial court thought that non-cited Messick, Wood '540 and defendant's prior models were more pertinent than the references cited by the Examiner against the Lugash improvement patent.

It is clear that under the holding of this court in *Wham-O* that the alleged omission of the Examiner to consider prior art showing the pump, motor and reservoir mounted on the main frame along with the hydraulic cylinder, could not in any way affect the presumption of validity. These non-cited patents at best disclose only part of the constituents of the patented combination.

Actually, the Examiner handling the application for the Lugash improvement patent did have the best prior art before him in citing the Lugash generic patent. This is clear from the testimony of defense counsel's questioning of *his* patent expert.

"Q. All right. Now, the introductory phrase of claim 1 of Lugash '196 [the improvement patent] stated: 'In a load hoisting means attachable as a unit to a vehicle frame . . .'.

Now, is the load elevator of the first Lugash patent attachable as a unit to the vehicle frame?
A. Oh, it is primarily a unit. The unit is shown in orange in Figures 1 and 2 [referring to Exhibit AN-1].

Q. Well, is it or is it not attachable as a unit? Can you answer that 'Yes' or 'No'? A. I think the basic parts are attached as a unit.

Q. Are all of the parts attachable as a unitary assembly? A. No, there are several pulleys that are attached up above it with a cable going over them. But it would be obvious from the fact that the principle structure is all a unit. It is very clearly pointing the way there." [Tr. 833, line 10, to 834, line 1].

On this point, we submit that the defendant's position is self-impeaching, not only because of the above defendant's expert testimony, but also because of the testimony of defendant's president, Mr. Vogel, with regard to unitary construction historically in the field of lift gates. As early as 1948, he began manufacturing unitary lift gate loaders [Tr. 345, lines 8-19]. In 1948, he filed a patent application [Ex. I] having unitary construction of lift gates as a primary objective [Tr. 361, line 20, to 363, line 11]. As recently as 1956, he filed another patent application, with a brother, which issued as Vogel *et al.* patent 2,820,554 [Ex. C], for a tail gate lift of unitary construction [Tr. 379, lines 10-24]. On cross-examination, he admitted that during the years between 1948 and 1956, it was obvious to him that a tail gate loader could be made of a unitary construction. His is the last in a series of patents relied on by defendant showing unitary lift gates, such as Messick '923, Wood '540 and further, after a long experience running back to 1948 in manufacturing unitary lift gates.

All of these unitary lift gate constructions are various combinations of tail gate platforms, lifting linkage,

main frames and power means. In view of these numerous prior patents of unitary lift gate loaders, each of which combines the parts differently and is confined to a tail gate environment, it is not logical for defendant to contend that the combination of these parts differently arranged as in the Lugash improvement patent, *in the completely different environment* of a fold-away platform loader, is obvious. Further, we submit that it is inconsistent for defendant to say that Lugash's unitary invertible platform construction, which defendant's expert conceded to be the only one of its type [Tr. 825, line 19, to 826, line 6] can be obvious, while defendant itself is the possessor of a patent on a unitary loader which is the last in a well-plowed field of patents and prior devices on unitary tail gate loaders.

IV.

While Claim 6 of the Improvement Patent Does Not Mention That the Platform Is Invertible, the Only Proper Construction of the Claim Is for a Loader Having an Invertible Platform.

As has been pointed out, the Lugash improvement patent fully discloses and teaches a unit which can be applied to the truck in any desired location where it can be moved to a position where it is completely out of the way when not in use and which will not add to the width or length of the vehicle or interfere with normal loading or unloading from docks [Ex. 2, Col. 4, lines 34-52]. It is specifically pointed out to be an improvement over his generic patent for the combination of parallel linkage systems and invertible platform.

Neither the generic nor the improvement patents of Lugash have to do with tail gate platform loaders

or floor platform loaders. There is not the slightest implication in either of the Lugash patents that they have to do with anything other than the type of loader in which the load platform is of the type which must be inverted over the lifting linkages for stowing. Both patents obviously have to do only with invertible platform loaders. Under these circumstances, the only proper construction of Claim 6 is that it defines a loader of the invertible platform type and this is consistent with the holding in *United States v. Adams*, U.S., 34 Law Week. 4132, 148 U.S.P.Q. 479.

Adams involved combination claims to a battery. While some of the claims specifically mentioned the type of electrolyte to be used with the battery, others did not state the electrolyte to be used. It was there contended that the claims were invalid on the basis of prior art which did not show any successful water activated battery, although alleged to show that the same elements had before been used in combination in batteries and that the combination was an essentially old formula. The contention was rejected by the court which said, with respect to those claims not stating the type of electrolyte:

“First, the fact that the Adams battery is water activated sets his device apart from the prior art. It is true that claims 1 and 10, *supra*, do not mention a water electrolyte, but, as we have noted, a stated object of the invention was to provide a battery rendered serviceable by the mere addition of water. While the claims of a patent limit the invention, and specifications cannot be utilized to expand the patent monopoly . . . , it is fundamental that claims are to be construed in

the light of the specifications and both are to be read with a view to ascertaining the invention. . . . Taken together with the stated object of disclosing a water activated cell, the lack of reference to any electrolyte in claims 1 and 10 indicates that water alone could be used. Furthermore, of the eleven claims in issue, three of the narrower ones include references to specific electrolyte solutions comprising water and certain salts. The obvious implication from the absence of any mention of an electrolyte—a necessary element in any battery—in the other eight claims reinforces this conclusion.”

Where a claim is susceptible of two different constructions, a court should adopt that which will sustain the claim, rather than that which is fatal to the claim. *Smith v. Snow*, 294 U.S. 1, 14, 55 S. Ct. 279, 284.

“The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules and interpretation”.

Topliff v. Topliff and Another, 145 U.S. at page 171, 12 S. Ct. at page 831.

It is also pointed out that if claim 6 is construed without an invertible platform it is inoperative to achieve the results which are the objective of the Lugash improvement patent. For example, if the unitary loader were used as a side loader, as in Figure 10, but if the platform were not invertible, this would completely defeat the use of the device as it could not be stowed and

would excessively add to the width of the vehicle, which Lugash states on page 2, column 4, line 49, his invention avoids. To construe the claim without inversion of the platform would make the Lugash disclosure inoperative for its intended purpose. Claim 6 is *under*-inclusive and, therefore, ambiguous, requiring a look at the specifications to explain the gap in claim 6 in omitting “invertable” as a limitation of “platform”. This result is within the holding of this court in construing a claim for a scaffold where the essential element of a bar was omitted, but the claim was sustained. *Beatty Safway Scaffold Co. v. Uprising, Inc.*, 306 F. 2d 626 (C.A. 9, 1962).

Also significant is the fact that claim 6 was not treated any differently than the other claims by the Patent Examiner and Lugash’s attorney during prosecution of the application. The attorney presented it to the Examiner “as a broader expression of the invention *above described*” [Ex. B, p. 23], meaning the preceding claims, all having the invertable platform. The Examiner grouped the claim with all the others in acting on it [Ex. B, p. 24] and in response, the applicant’s attorney did not differentiate the claim from the others, as regards the inversion feature [Ex. B, pp. 23-24]. The inadvertent and unnoticed omission of the inversion feature from claim 6 should not defeat the claim—it should be construed to give it the meaning which was intended by the applicant and understood by the Examiner, as was done in *I.T.S. Rubber Co. v. Esser*

Rubber Co., 279 U.S. 429, 441, 442, 47 S. Ct. at 140, where the court sustained a claim not including the word “rear”.

CONCLUSION.

The patent statute specifically provides for patents on improvements. “Any person who has invented or discovered any new and useful . . . machine . . . or any useful improvements thereof . . . may obtain a patent therefor.” 35 U.S.C. 101. *Williams Manufacturing Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 366, 62 S. Ct. 1179, 1180. The evidence is clear that the plaintiffs’ Tuk-A-Way loader, made under both the generic and improvement patents of Lugash, has had impressive commercial success [R. 565, lines 6-8]. As compared to the Lugash generic patent, patentability of his improvement patent presents a closer case but if doubt remains, this commercial success tends to prove the originality and utility of the improvement. *Hayes Spray Gun Co. v. E. C. Brown Co.* (C. A. 9, 1961), 291 F. 2d 319, 322.

A new combination achieving a new and useful result is not within the reach of the rule in *Lincoln Engineering*. The folding concept claimed in Lugash’s generic patent is of patentable significance as part of the new combination of his improvement patent. Elements of the claimed combinations are disclosed to the art only by the improvement patent, whose presumption of validity cannot be destroyed by prior art which does not even address itself to this disclosure. We respectfully

submit that the Trial Court erred in ruling to the contrary; that the Lugash improvement patent 2,989,166 should be sustained; and the case remanded on the cross-appeal solely for the purpose of making findings on the issue of infringement.

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK E. MUELLER,

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No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MANUFACTURING CORPORATION,

Appellant and Cross-Appellee,

vs.

MAX J. LUGASH AND MAXON INDUSTRIES, INC.,

Appellees and Cross-Appellants.

Reply Brief of Cross-Appellants Max J. Lugash
and Maxon Industries, Inc.

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SANTA ANITA MANUFACTURING CORPORATION,
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**Reply Brief of Cross-Appellants Max J. Lugash
and Maxon Industries, Inc.**

The defendant's answering brief on this cross-appeal (hereinafter cited as "XAB") avoids the central contentions of plaintiffs' opening brief (cited as "XOB"). In addition, the defendant's brief misstates the record at a number of places, which are in need of correction.

I.

Defendant's Brief Demonstrates the Error of Applying Intricate Metal v. Schneider to Lugash '196.

Defendant does not question the factual accuracy of the "concise statement of the case" in plaintiffs' opening brief but says that the references to the generic Lugash '227 patent "are irrelevant" to the cross-appeal on the Lugash improvement patent '196. Defendant prepared Findings 31-35(a) regarding the second Lugash patent,

which specifically refer to the first Lugash patent. Defendant itself in its answering brief on the cross-appeal makes frequent references to the first Lugash patent (*e.g.*, XAB 3-5, 15, 30).

An issue in this case is whether the trial court improperly extended the rule of *Intricate Metal Products v. Schneider*, 324 F. 2d 555. As contended by plaintiffs (XOB 22-30) it is essential to distinguish between the claimed subject matter of the Lugash generic patent '227 and the disclosures of the generic patent which are not claimed therein and which are nowhere else to be found in prior art. *Intricate* says it must be done, as was done by plaintiffs in their statement of the case (XOB 6-7). It is relevant.

Finding 34 [R. 671] says that Lugash '227 claims "the folding concept", and that folding is "therefore not of patentable significance in patent '196," which is error. Both patents claim *combinations*, one of whose elements is the invertible platform, which element is material to both combinations. The presence of this element in both combinations cannot detract from patentability of the later filed Lugash '196 (XOB 28-30). *O'Reilly v. Morse*, 15 How. 62, 122.

The Examiner in the Patent Office rightly understood the rule misapplied by the trial court. He repeatedly distinguished between "the claimed subject matter" of Lugash '227 and the *combinations* sought to be claimed in '196 [Ex. B, pp. 20, 24]. Then, when the claims sought in '196 were amended to define the new manner of combining the elements in a new manner of coaction, the combination claims were allowed [Ex. B, pp. 26, 29].

II.

The Patent Office Examiner in Considering the Claims of the '196 Patent, Had the Best Prior Art Before Him in Citing Lugash '227.*

Lugash '196 claims a unitary invertible platform loader. Lugash '227 claims an invertible platform loader broadly summarized as the combination of parallel linkage systems and invertible platform. Defendant's expert said of the generic Lugash '227 patent, "I think the *basic* parts are attached as a unit" [Tr. p. 833]. None of the claims of Lugash '227 claim a unitary assembly, although defendant's patent expert thought that '227 "is very clearly pointing the way there" [Tr. p. 834].

Intricate Metal, as properly understood, makes it clear that to the extent Lugash '227 specification was pointing the way to the unitary invertible platform loader claimed only in Lugash '196, the second patent includes in its claims unpatented disclosures of Lugash '227 not shown by any prior art. Defendant's patent expert admitted that no prior patent was addressed to the objective of a unitary invertible platform loader and no prior patentee had elements combined in the manner to make such a loader [Tr. p. 823, lines 10-15; Tr. p. 825, line 9, to p. 826, line 6].

In attempting to deal with the *Intricate Metal* case, defendant's brief unconsciously strengthens plaintiffs' contention that the actually claimed subject matter of Lugash '227 constitutes the best prior art against Lugash '196. Thus the non-cited prior art relied on by

*At page 32 of our opening brief, we quote testimony by defendant's patent expert and describe it as being in response to his own counsel's questioning. Actually, the quoted testimony was on *cross-examination* by plaintiffs' counsel and was therefore presented less forcefully than it could have been.

defendant is valueless as a basis for rebutting the presumption of validity of '196. It has never been plaintiffs' position that the element of a frame structure constitutes "the additional element providing a new unitary combination in Lugash '196" as defendant's brief says (XAB 30). However, this misrepresentation of plaintiffs' position substantiates plaintiffs' contention that the *claimed* subject matter of Lugash '227 was the best possible pertinent art on which the Examiner could have relied, as he did.

A "frame structure" is one element of the combination of claim 5 of Lugash '227 (which is not in suit). Clearly, this claimed subject matter constitutes far more pertinent prior art than the unitary tailgate structures relied on by defendant.

III.

Defendant's Brief Promises, but Does Not Deliver, References to Evidence in the Record in Support of Findings 34-35(a) (XAB 30).

Logic dictates that a finding of fact is "clearly erroneous" when the record is totally barren of any evidence in support of what is stated in the finding. Now Lugash '196 claims a combination of elements, one of which is an invertible platform. Not one of the tailgate items of prior art mentioned in Finding 35 has a scintilla of a suggestion of such element and at the trial, defendant did not introduce any such testimony or claim on behalf of the tailgates mentioned in Finding 35. The finding having thus been challenged, Rule 18(3) of this court requires defendant's brief to "contain record references to the evidence relied upon by appellees as supporting the challenged finding." Defendant's brief does not mention any such record references and we think there are none.

As we have shown, (XOB 22-24), only Lugash '196 has the vital disclosure of a manner of unitary arrangement of the parts for operative clearance therebetween for stowing a platform loader. Finding 34 claims such disclosure on behalf of prior art tailgates. Defendant's *only* evidence, regarding Lugash's *claimed* combination, was with reference to a *tailgate* loader having a notch in the wrong edge of the platform for totally different purposes. This evidence was so summarized in plaintiffs' opening brief (XOB 23, 24) and defendant's brief does not even deal with it.

With respect to plaintiffs' Specification of Error 5, defendant's brief nowhere contests the fact that Lugash '196 for the first time discloses and gives the art a unitary invertible platform loader. With respect to plaintiffs' Specification of Error 6, defendant's brief nowhere contests the portions asserting that only the unitary invertible platform loader of Lugash '196 eliminates problems of both preserving the operating alignment of its own parts and the problem of mating alignment of a load platform with specially cut openings in the floor or side wall, or both, of a truck or vehicle. Defendant's failure to contest these matters demonstrates that the trial court did not accurately and fully summarize the advance of Lugash '196 over the prior art.

IV.

Defendant Cannot Limit Lugash to His Filing Date for His '196 Patent, i.e., September 27, 1957.

Defendant makes this attempt in order to rely on its EB 1200 and EB 1500 as prior art unitary tailgate loaders (XAB 20), first sold in July 1957 [Ex. 6—Answer to Interrogatory 7(e)].

The fact is, that plaintiffs' Tuk-Away loader under the '196 patent was manufactured and sold *prior to* defendant's EB 1200 and EB 1500 tailgate loaders. At page 14 of its opening brief on the main appeal, defendant alleges [without proof and contrary to Finding 9] that there were no successful commercial embodiments of the '227 patent. Defendant there says that it was only the commercial loader of the '196 patent which was commercially successful, and that loader of Lugash was first sold at least as early as April 26, 1957 [Ex. AU—Answers to Interrogatories 4 and 7], two to three months before defendant's 1200 and 1500 tailgate loaders.

Defendant goes on to allege certain acts done in converting its 1200 and 1500 tailgate loaders to the infringing Folda-Lift (XAB 20, 21). The Patent Act tells us (35 U.S.C. 103) that the non-obviousness of an invention is to be determined as of the date the invention was made. The evidence shows that Lugash's unitary invertible platform loader invention was made at least by April 26, 1957 and, conclusively, no later than September 27, 1957, but the defendant in this part of its brief talks *only* of acts performed subsequent to Lugash's filing date. Obviously, the legislative fiat makes such evidence totally unacceptable for this purpose.

V.

Defendant Now Attacks as "Mere Verbiage" a Result Which Lugash '196 Explicitly States and Which Defendant Didn't Even Contest at the Trial.

In constructing this new argument, defendant cites portions of the record which are not directed to the point.

Defendant says that “plaintiffs are required to advise this court exactly what the purported invention of the second Lugash patent ’196 is” (XAB 10). Plaintiffs, in their brief, repeatedly and exactly summarized Lugash ’196 as a unitary invertible platform loader attachable as a unit to any desired location under a truck. Defendant deletes the invertible platform from Lugash’s combination, which is precisely one of the errors of Finding 34 [R. 671].

The difference between plaintiffs’ definition of the Lugash ’196 invention and defendant’s résumé of it is this—Lugash ’196 claims a *combination* of elements, one of which is an invertible platform, arranged with clearance for the several parts “to swing said linkage means upwardly . . . with consequent elevation . . . of the inverted platform to a position beneath the vehicle bed” [Lugash ’196—Ex. 2—Claim 1]. Lugash’s ’196 patent is directed to a unitary stowable loader “which can be applied to a truck in any desired location”—“whether the hoist is mounted on the end or side of the vehicle” [Ex. 2, Col. 4, lines 34-37 and Col. 4, lines 41-52].

Is this “mere verbiage”? Although defendant now says so, it advertises its unitary infringing device as, “Ideal for unusual requirements such as mounting on side of body” [Ex. 4]. Truckers do not buy “verbiage.”

The practical significance of the new result of Lugash ’196—the extent to which it is ideal for unusual requirements—is very well brought out by defendant’s reference to its Exhibits EG and AC [defendant admitted that Ex. EG is “obviously” not prior art Tr. p. 402].

First, Exhibit EG, page 5, shows a tailgate adapted to special use as a side loader on a school bus. Obviously, (1) that loader is not an attachment—(2) there

is a problem in mounting that loader in operative alignment with a special cut-out in the floor of the bus and, also, with the double door of the bus. And so we see the merit of plaintiffs' Specification of Error 6, which points out that Lugash '196 for the first time provides a unitary power loader attachable at any desired location under a truck and which eliminates the problems of alignment obviously inherent in the device relied on by defendant, which device cannot be stowed at all.

Defendant also refers to Exhibit AC, page 4, showing two tailgate loaders mounted as side loaders on a semi-trailer. There is no evidence in the record that these side mounted tailgate loaders are unitary, as argued by defendant. There is no evidence in the record of what, if anything, happens to the load platforms when the device is not being used for loading and certainly no evidence that they can be stowed under the bed of the truck.

Lugash in his '196 patent has taken all of the elements of a power loader and arranged them into a unitary assembly that can be folded into a compact stowed loader so that when not in use, the whole is out of the way under the bed of the truck, at any position under the truck. This is a substantial accomplishment. The patent of defendant's president points out the problems of attaching mere liftgate loaders in the "severely limited space" under vehicle bodies, to paraphrase him [Ex. C—Vogel '554, Col. 1, lines 22-27]. Vogel has such a fear of this severely limited space that in his '554 patent, he puts practically none of the parts of his tailgate loader under the truck bed—note how his main frame, lifting arms, platform and power means *all* protrude beyond the end of the truck bed.

Nor is Vogel alone in avoiding the environment of severely limited space which Lugash attacked. Messick says of his unitary tailgate that it “mounts all parts of the invention directly at the rear of the truck where they are readily accessible. No parts extend forwardly under the truck to inaccessible places” [Ex. C, Messick, Col. 3, lines 78-81]. Defendant also relies heavily on Wood ’540, who puts *none* of his parts under the truck bed. Wood says of his unitary tailgate that “it is attached to and mounted upon the open and unencumbered rear end of the truck body with no need to rely upon the chassis or engine environment or cab of the truck” [Ex. C, Wood ’540, Col. 3, lines 9-12].

VI.

Lugash’s ’196 Patent Claims a Manner of Arranging the Elements of the Combination With Clearance for Operation of the Parts for Both Loading and Stowing Purposes.

Plaintiffs are charged with “the complete fabrication of a problem of clearance” (XAB 14). We submit it does not constitute “fabrication” to merely quote or paraphrase the language used in an exchange between defense counsel and his patent expert. *They* conclusively established that if one is going to fold a large platform, a pair of linkage systems and the hydraulic cylinder into the same limited space, there is a problem of arranging the parts in a manner to allow them to operate. They said it was a “problem”. The language did not originate with plaintiffs.

“Q. Now, in the ’196 patent, when Lugash decided to move the hydraulic cylinder in the middle between his arms into a substantially vertical position, was he faced with a problem when he folded his platform? A. Yes.” [Tr. p. 658, lines 9-18].

Defendant quotes plaintiffs' patent expert, out of context, as support for defendant's fallacious proposition. After quoting Mr. Comstock as saying, "That is right" (XAB 3), they delete the rest of his answer in which he made it plain that mere frictional engagement between an inverted platform and hydraulic cylinder casing is insignificant, rather than significant, as regards operating clearance of the parts. [Tr. p. 252, line 23, to p. 253, line 5].

Claims 1, 2 and 4 of Lugash '196 claim, relatively broadly, the manner of arrangement of the parts to achieve the requisite clearance function for operating in both loading and stowing operations. Of the claims in suit, only claim 5, which is dependent on claim 4, puts any specific structural definition on one of the parts for the clearance arrangement already defined in claim 4, *i.e.*, "a recess affording clearance for said piston and cylinder when said platform is disposed in said inverted position".*

Defendant erroneously attempts to restrict all of the claims in suit to the specific recess of claim 5. This cannot be done, as is well brought out by *Stearns v. Tinker & Rasor*, 252 F. 2d 589, 597.

In so concentrating on mere slots, rather than dealing with Lugash's claimed arrangement of the parts for clearance, defendant concentrates its attack only on the validity of claim 5. The trouble with this approach of defendant, even as applied to claim 5 only, is that there is no evidence of record which could reasonably support its position. The best defendant could do in this respect

*Notwithstanding defendant's assertion (without record citation) to the contrary, some models of the infringing Folda-Lift were proved to have the clearance recess, as in claim 5 [Ex. E, pp. 98, 139].

was to point to a prior tailgate loader having a notch in the wrong edge of the platform for the wrong purpose as was pointed out in our opening brief (XOB 23).

Defendant's brief asserts "inverting of the platform and raising of the lifting arms in any of the Novotney '403, Narvestad '529 (Figs. 5-7) or Jester '243 patents would not interfere with operation of the power means" (XAB 16). Defendant cites no record in support of this allegation. Defendant's statement attributes to Jester a possibility which Jester himself specifically prohibits [Ex. D, Jester, Col. 1, lines 12-17, page 2, Col. 2, lines 15-21]. With regard to Narvestad [Ex. C], defendant's expert admitted that the power means has no function in sliding the platform in and out of a stowed position [Tr. p. 801, lines 4-6]. A merely cursory examination of Novotney '403, Narvestad and Jester reveals that none of them is of a unitary construction and none of them teaches a unitary invertible platform loader [Tr. p. 825, line 9, to p. 826, line 6; Tr. p. 823, lines 10-15].

VII.

The Claimed Subject Matter of Lugash '196 Is the Entirety of the Combination.

"If anything is settled in the Patent Law, it is that the combination patent covers only the totality of the elements in the claim . . ." *ARO v. Convertible Top*, 365 U.S. 336, 344. To subtract an element from a combination claim is not permissible. *Fay v. Cordesman*, 109 U.S. 408, 421. Contrary to these principles, defendant asks the court to test the validity of the Lugash '196 claims by reading out of them the invertible platform element.

Defendant thus attempts to reduce Lugash's claimed combination, including the invertible platform element, to merely a unitary structure without any invertible platform or clearance arrangement, for purposes of a specious reliance on *Graham v. John Deere*, 86 S. Ct. 684. The trouble with this gambit is that the immutable facts of the file history and controlling rules of law do not permit such a result.

The distinguishing feature of Lugash's combination is neither a unitary construction *per se* nor an invertible platform *per se*. As is plain from a reading of the claims, considered in the light of the specification and file history, Lugash's invention, as a whole, is a unitary loader with an invertible platform and with this unitary assembly having the parts arranged with the power means "connected to said linkage means at a point thereon affording clearance for movement of said platform to said inverted position . . ." and "operable to swing said linkage means upwardly about said pivotal connection with said main frame member with consequent elevation . . . of the inverted platform to a position beneath the vehicle bed" [Ex. 2, Lugash '196, claim 1]. The distinction of Lugash '196 is the combination, not the individual or several elements, and certainly not unitary construction, broadly speaking.

Defendant argues that "a myriad of old elements . . . were *added* to the claims in order to obtain the issuance of this patent" (XAB 9). This is not an accurate statement in any respect. That "myriad of old elements" was present in application claim 6 as filed [Ex. B, p. 10] and allowed as claim 4, after amendment in other respects [Ex. B, p. 21].

Defendant's position is additionally factually wrong because it attempts to lead the court to a conclusion that it was only because of the addition of the "myriad of old elements" that claims were allowed to Lugash. That is not so. The Examiner twice rejected Lugash's claims when they included these elements but did not define the arrangement of the elements for operative clearance in carrying out their function [Ex. B, pp. 17-24].

Clearly, what caused the Examiner to allow claims was the argument made in the last amendment that they had been amended "to bring out the fact that the supporting and lifting linkage and the platform, as well as the lifting means are all arranged so that the platform can be swung to an inverted position upon the lifting linkage" [Ex. B, p. 26]. It was this novel combining of the parts, recited in the claims, which the Patent Office Examiner could not find in the prior art and which is not in any prior art.

VIII.

Prior Concepts Do Not Anticipate Subsequent Devices, Which Is the Gist of Defendant's Argument.

Because there were prior unitary tailgates, defendant contends "There can be no patentable invention in forming a unitized assembly" (XAB 12). This court in *International v. Landon*, 336 F. 2d 723 held valid two patents on unitary construction, despite prior art unitary devices.

The most that can be said for defendant's argument is that defendant has shown that there was in the prior art the same catalog of elements as Lugash '196. The findings, when fairly read in the light of the court's

opinion, go no further than that, which this court has held to be insufficient in saying "The invalidity of a combination patent is not established by showing only that there was, in the prior art, a device containing the same elements". *International Manufacturing Co. v. Landon, Inc.*, *supra*, at 336 F. 2d 726. It never has been the law that a combination patent is invalidated merely by showing that a relevant concept was in the prior art. Obviously the first tailgate patent in this record, Ducondu '473, does not invalidate all subsequent tailgate loader patents. Yet, this is the rationale of defendant in its brief, in arguing that prior unitary tailgate loaders or patents are, without more, sufficient to invalidate Lugash's claimed unitary invertible platform loader.

Being obsessed with the tailgate idea, the prior unitary patentees were not even aware of the existence of the clearance problem involved in Lugash's loader and, therefore, as might be expected, defendant has not been able to prove that any prior patentee, consciously or unconsciously, devised the specific arrangement of parts claimed by Lugash in his '196 patent.

IX.

Plaintiffs' Contention — That Lugash's Admittedly Novel Combination, Productive of New and Useful Results, Entitles Him to His '196 Patent Under Controlling Authority (XOB 30) — Is Completely Avoided by Defendant's Brief.

Instead, defendant's argument is a contrived attempt to bring this case within the purview of *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147 and *Lincoln Engineering Co. of Illinois v. Stewart-Warner Corp.*, 303 U.S. 545.

Defendant alleges, without any record citation, that “Lugash ’196 claims define an *old* combination” (XAB 23). No finding of fact supports this bare allegation. Although made up of old elements, Lugash’s claims define a *new* combination. Surely this is incontrovertibly established by the admissions of defendant’s patent expert—that no prior patentee shows the combination of an invertible platform and parallel rule linkage systems [Tr. pp. 786, 787], let alone any conception of a unitary invertible platform loader [Tr. p. 823, lines 10-15], and that prior to Lugash ’196 there never was any unitary loader with an invertible platform shown or described [Tr. pp. 825, 826].

This new combination is not subject to the principles stated in *A & P* and *Lincoln* because Lugash is not in the position of one who merely improves one element of a prior combination and then seeks to claim the entire combination, rather than the improvement *per se*. In *A & P*, the court expressly exempted a new combination from the principle applied there, saying:

“ . . . if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to include it, the patent would nevertheless be invalid for overclaiming the invention by including old elements, *unless*, together with its other old elements, the extension made up a *new combination* patentable as such” (Emphasis added). 340 U.S. at 150.

Lincoln also involved overclaiming, *i.e.*, the patentee improved an element but claimed the entire combination. The principle of *Lincoln* was expressly held not applicable to a new combination in *Williams Manufacturing Co. v. United Shoe Machinery Corp.*, 316 U.S.

364. And so this court was correct and should follow its ruling in *Pursche v. Atlas Scraper and Engineering Co.*, 300 F. 2d 467 at 477, that the principle of *Lincoln* cannot be applied to Lugash's new combination producing new and useful results.

As this court said in *Pursche v. Atlas*, even if every element of the combination remains a unit retaining its own individuality and identity as a complete and operative means, the combination is an entirely new and distinct thing, which new combination is not within the reach of *Lincoln* when that combination, as distinguished from its elements produces a new and useful result, as does Lugash '196.

Defendant's argument ignores the plain meaning of Lugash's claims. The parts cooperate with one another not only for the purposes of loading and stowing but, also, with clearance permitting those two functions within a unitary compact assembly that can be stowed *under* any location on a truck bed. No prior device has that complete organization—let alone the clearance functions of the parts in Lugash's combination.

X.

It is Now Clear That the Exclusive Tests of Patentability Are the Three Statutory Conditions of Utility, Novelty and Nonobviousness.

This is true of all patents—there are no special tests for combination claims that are not comprehended within the statutory scheme. While defendant seeks to impose the condition of promoting “the progress of science” (XAB 41), *Graham v. Deere*, 86 S. Ct. 684 definitively states that the constitutional objective is to advance “the useful arts”, 86 S. Ct. 687, and whether a

patent does so or not is to be determined solely within the framework of the statutory scheme by making basic factual inquiries as to utility, novelty and nonobviousness, 86 S. Ct. 694.

Notwithstanding the attempt of defendant's brief to contest utility and novelty of Lugash '196, the record is clear that the sole issue on this cross-appeal is one of nonobviousness under 35 U.S.C. 103, approached in the light of *Graham v. Deere* and *United States v. Adams*, 86 S. Ct. 708. It is clear that the differences between the prior art and Lugash '196 cannot reasonably be reduced to less than the following, which under the authorities, demonstrate the presence of "invention"—*i.e.*, nonobviousness—of Lugash '196:

A. As distinguished from defendant's rough summation of Lugash '196, the combination actually claimed by Lugash is novel—there is no evidence in the record that any prior art combined the elements in the manner in which they are combined in Lugash's claims.

B. No prior art ever conceived of Lugash's concept of a unitary invertible platform loader attachable at any location under a truck.

C. There is no evidence in the record that any prior worker in the field, even unconsciously, arranged the parts of the loader in the manner claimed by Lugash to achieve the manner of cooperation of these parts to effect a unitary, invertible platform loader.

Defendant treats Lugash '196 as though it covered the same old catalog of elements long used in power loaders, while minimizing differences which it concedes only inferentially. But that is not an attack on the

claims of Lugash '196. He does not claim that old catalog of elements. He claims a new combination—of elements arranged in a manner to achieve a compact, unitary invertible platform loader—a specific device which the art never had before.

The structural differences of Lugash '196 over the prior art are spelled out in the claims. But then Defendant minimizes the *quality* of these structural differences, alleging that they are within the capability of a person of ordinary skill in this art. That is beside the point under the facts in *this* case. As has long been recognized by Supreme Court standards, small differences can support a patent and simplicity of structural change does not necessarily mean that the constitutional objective of advancing the useful arts has not been fulfilled. "The emphasis on nonobviousness is one of inquiry, not quality, and, as such, comports with the constitutional strictures". *Graham v. Deere*, 86 S. Ct. 693. This is justly so because "in every case, the idea conceived is the invention." *Gill v. United States*, 160 U.S. 426, 436, and Lugash's guiding conception was totally absent in the prior art.

As we pointed out in our opening brief (XOB 22-24), only Lugash '196 teaches and claims a particular disclosure which is an essential part of his combination. The manner of combining the parts for clearance purposes and the manner of their co-action for clearance for Lugash's particular end was clearly never appreciated by any prior worker in the field. That also is evidence of "invention", *i.e.*, nonobviousness. This was true in the Supreme Court before *Graham v. Deere*, as in *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 361 U.S. 45. Since *Graham v. Deere*, and in the

light of that recent decision, this rule has been applied as dictating nonobviousness in *Gray Company, Inc. v. Speeflow Manufacturing Corp.*, by the Court of Appeals for the Fifth Circuit, 149 U.S. P.Q. 804 at 805.

Conclusion.

On this record, it cannot reasonably be questioned that Lugash in his '196 patent had an original idea which became embodied in a mechanism which is practical for everyday use by truckers. Once done, how easy it is to look back and say that anybody could have done it. But the law has other tests than such conjecture. The patent statute and any consideration of nonobviousness under 35 U.S.C. 103 requires basic factual inquiries, which are more practical tests of patentability. *Graham v. Deere*, 86 S. Ct. 693, 694. A far more objective indicia of patentability than an infringer's characteristic 20-20 hindsight is defendant's concession that the loader of Lugash's '196 patent has had remarkable commercial success. That is to say, that it is greatly practical for everyday use. Clearly then, a unitary, invertible platform loader has been of some significance in advancing the useful arts—it is "Ideal for the unusual situations" [Ex. 4]. The loader of Lugash '196 works in these unusual situations and this record is totally barren of evidence that any prior device ever foresaw the particular niche in the art created by Lugash '196.

As this court has held, the fact that Lugash '196 "works", on a record having no evidence that any prior device did work for Lugash's purpose is "something" indicating "invention", i.e., non-obviousness. *Twentiers Research, Inc. v. Hollister, Inc.*, 319 F. 2d 898, 902.

This factor is important as an indicator of nonobviousness as the same rationale was applied by the Supreme Court in *United States v. Adams, supra*. Adams' battery worked. It had operating characteristics giving valuable advantages over the non-equivalent prior art relied on there. So, in this case, defendant itself has admitted that the device of Lugash '196 is ideal for unusual situations and there was not in the prior art any equivalent device known for the purpose. It is not obvious and this court should uphold the Lugash '196 patent.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT W. FULWIDER

No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MANUFACTURING CORPORATION,

Appellant and Cross-Appellee,

vs.

MAX J. LUGASH AND MAXON INDUSTRIES, INC.,

Appellees and Cross-Appellants.

Answering Brief of Appellees Max J. Lugash and
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No. 20267

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Appellees and Cross-Appellants.

Answering Brief of Appellees Max J. Lugash and
Maxon Industries, Inc.

Introduction.

Defendant's appeal is from a judgment holding Lugash Patent No. 2,837,227 valid and infringed [R. 675]. After a six day trial [Tr. 1-905], post-trial briefs were filed [R. 428, 486] and final argument was had [Tr. 906] resulting in the court's opinion favorable to the patent [R. 561]. The court heard argument on defendant's objections to proposed findings of fact, conclusions of law and judgment, and extensively revised them [Tr. 917-948] into the form contained in this record [R. 662-677].

Defendant's brief specifies alleged errors (A.O.B. 10-15) in nearly all of Findings of Fact 6 to 30 [R. 663-670], dealing with validity and infringement, but

many of them are not argued and nowhere is there an attempt to demonstrate lack of substantial evidence to support the findings. Instead, defendant has extracted shards or fragments of evidence, some of which is favorable to it, some of which is made to seem so by viewing it in isolation and some of which is inaccurately characterized.

This “court is not required to discover or attempt to discover alleged errors that appellant’s counsel cannot or will not point out.” *Continental Connector Corp. v. Houston-Fearless Corp.*, 350 F. 2d 183, 189 (C.A. 9, 1965)

“. . . it is not incumbent upon *appellees* to persuade this court that the district court’s findings are correct; on the contrary, the *appellants* must persuade this court that the district court’s findings of fact are, as specified by appellants, clearly erroneous.” (Emphasis in original).

Pacific Queen v. Symes, 307 F. 2d 700, 706 (C.A. 9, 1962).

Defendant has not observed this court’s Rule 18-2-(c)(d) and (e). As a result, an understanding of the facts and defendant’s contentions in relation to them cannot reliably be derived from defendant’s brief. In its statement of the case and specifications of alleged errors, (A. O. B. 2-15) argument is commingled with “fact”; almost every one of 14 specifications of alleged error argues defendant’s version of case authorities; almost every specification contains and mixes several alleged errors of fact and/or law to such an extent that it is well-nigh impossible to even count them (*e.g.*, specification 3, A. O. B. 10, 11).

Every criticism of the appellant's brief stated by this court in *Thys Co. v. Anglo-California National Bank*, 219 F. 2d 131 (C. A. 9, 1955) is applicable. Defendant's brief, is not calculated to conserve the time and energy of the court nor to advise appellees, fairly and clearly, of the points which they are obliged to meet. A dismissal of the appeal, so generously withheld by the court in *Thys*, is warranted here. In any event, defendant's inaccurate presentation of the matter is a factor to be taken into account in determining the merits. Did the trial court decide in favor of plaintiffs because "confused" on the law as charged by defendant (A. O. B. 30) or mistaken about all of the evidence on nearly all of the Findings (A. O. B. 10-15)? Had the defendant made a fair and proper opening, it would be evident from that major portion of the record (about 90%) nowhere referred to in its brief, that very substantial evidence and legal criteria support the trial court's holding for plaintiffs.

A few examples demonstrate the need for a restatement of the case. From its fragments of the record, defendant argues that Lugash '227 is a "step backward in the art" (A. O. B. 43), neglecting to mention defendant's admission that it actually is "THE NEW-EST" idea in mechanized loading [Tr. 617]. Defendant now relies heavily on its Exhibit E-G which, at trial, its counsel said is "obviously" not prior art [Tr. 402]. Defendant says its experts' testimony on obviousness was "uncontradicted" (A. O. B. 39), ignoring the fact that they were cross-examined thereon extensively [Tr. 493-617, 761-826] and that plaintiffs' expert testified to the contrary [Tr. 879, 880]. In arguing anticipation, "irrefutably" (A. O. B. 27), defend-

ant forgets the admission of its patent expert that not one of its 27 prior art patents shows a parallel rule linkage system which raises and lowers an inverted platform [Tr. 786, 787]. Defendant says that prior art Novotney '403 "shows" or "teaches" or "describes" a platform that can be inverted over a parallel rule linkage system (A. O. B. 27, 29, 31) in the face of admissions to the contrary forced out of both its experts by the court and plaintiffs counsel [Tr. 483-486, 779].

Restatement of the Case.

This case involves Lugash generic patent No. 2,837,-227 [Ex. 1] and Lugash improvement patent No. 2,-989,197 [Ex. 2] on power loading devices for trucks. Both are for loaders optionally movable between a tucked away position under the truck bed and a load supporting position extended beyond the truck bed. The second patent is for "an improvement over the hoist" of Lugash generic patent '227 [Ex. 2, Column 1, lines 8-12] *i.e.*, the second is a unitary assembly of the parts so forming a power loader attachable as a unit under any desired location on a truck [Ex. 2, Column 4, lines 34-37].

Santa Anita Manufacturing Co. was charged with infringement of both patents [R. 2]. The trial court held the generic patent '227 valid and infringed while the improvement patent for the unitary construction was held invalid [R. 675] and is the subject of plaintiffs' cross-appeal [R. 704]*, taken after defendant's appeal [R. 681].

*Plaintiffs' opening brief on the cross-appeal has a concise statement of facts germane to the cross-appeal. The restatement of facts in this brief restates facts contained in plaintiffs' previously filed brief on the cross-appeal, where apposite to the issues of the main appeal.

**A. The Subject Matter of Lugash Generic Patent
No. 2,837,227 in Suit.**

Lugash '227 is a mechanism, the parts of which function both:

1. As a loader to move loads on an approximately horizontal platform between ground level and the level of the truck bed, and
2. To move its parts into and out of a stored position under the truck bed [Tr. 105-120, Find. 6, R. 663].

The Lugash patent application, as filed, stated both objectives [Ex. 1, Column 1, lines 19-25]* which are carried out by a combination of elements briefly summarized from claim 8, for example, as

- (a) a pair of parallel rule linkage systems (*i.e.*, the two pairs 42, 44)
- (b) a platform (43)
- (c) connections between the linkage systems and platform comprising
 - (1) hinge means permitting inversion of the platform over the linkage systems (*i.e.*, the bolts 48, Fig. 3) and
 - (2) stop means to support the platform in load carrying position (*i.e.*, the ledge element 53, Fig. 1)
- (d) power means to lift the platform or to allow it to descend (*i.e.*, a cable hoist system including the cable 57 of Fig. 1, in one embodiment, and including a pair of hydraulic cylinders 70 in the embodiment of Figure 9 [Find. 7, R. 664].

*The specification of the Lugash patent application and issued patent are the same in all material respects. For convenience, reference will be made to the patent, Exhibit 1, rather than to the file history, Exhibit A.

As disclosed by Lugash, in his combination each of the parts functions both when the combination is used for loading and unloading purposes and, also, when the combination of parts is being put into and out of a stored position.

The parallel rule linkage systems during loading operations maintain the platform in a substantially horizontal plane during raising and lowering of the platform. (Compare the solid and phantom outline positions of the platform in Figure 1). When it is desired to store the platform under the truck bed the platform is manually inverted into superposed position over the linkage systems (Figure 3) the parallel rule linkage systems swing the platform from the lowered and downwardly pointing position of Figure 3 to the raised and upwardly pointing position shown in the uppermost phantom outline in Figure 5. In this sequence of movement, the platform changes its angle along with the changing angle of the parallel rule linkage systems, as contrasted to the constantly horizontal attitude of the platform during loading operations.

The power means is an active element in both loading and storing operations. It provides power both for raising and lowering loads and for raising and lowering the inverted platform and the parallel linkage systems into and out of the stored position [Ex. 1, Column 4, lines 33-55, Column 5, lines 13-17].

The connections between the linkage systems and the platform function both in loading and storing. During loading, the hinge means and stop means, in cooperation with the parallel linkage systems, maintain the platform in substantially horizontal attitude. In storing, when the platform is at ground level, the hinge

means permits swinging the platform through an arc sufficient to reach inverted position, as in Figure 3, without any interference from the parallel rule linkage systems or the stop means [Ex. 1, Column 3, lines 44-50, Column 4, lines 45-51].

Plaintiff's expert testified to the above effect [Tr. 105-120], and the court saw plaintiffs' loader in operation [Tr. 852 *et seq.*]. The trial court found that the Lugash combination of elements functions both as a loader and to move the device into an out-of-the-way position [Find. 6, R. 663]; the power means both moves the load platform into and out of stowed position as well as to carry out loading operations; and that the parallelogram linkage systems are active elements both in stowing and loading operations [Find. 8, R. 664].

B. Prior Art Relied on by Defendant.

Against both Lugash patents in suit, the defendant relied on some 27 prior art patents, contained in 2 books [Exs. C and D]. Defendant's counsel identified the patents in Exhibit C as allegedly anticipatory [Tr. 774, lines 12-20] but his patent expert could not agree with him as to the relative pertinency of the patents in the two books [Tr. 397, lines 7-9; 773, lines 12-25]. On cross-examination, defendant's patent expert admitted that no prior art patent shows the combination of parallel linkage systems and invertible platform [Tr. 786, line 7; Tr. 787, line 10].

Novotney '403 — (Exhibit C)

This patent is entitled "End Gate Loader". While defendant's patent expert said Novotney '403 has a parallelogram linkage system [Tr. 705, lines 1-9], de-

defendant's president in referring to the same structure was not sure that it comprised a parallelogram linkage system [Tr. 482, lines 1-6] and his uncertainty remained constant on cross-examination [Tr. 610, line 16; Tr. 611, line 14]. The latter admitted to the court that nothing in Novotney '403 indicates that the platform inverts over the lifting arms [Tr. 483, lines 4-15]. Defendant's patent expert also admitted Novotney '403 "doesn't say that the gate is to be used by being inverted over the arms" [Tr. 799, lines 12-17]. The Court made a distinction between the showing of Novotney '403 and this witnesses "argument on it" [Tr. 786, line 7]. The court found nothing in Novotney '403 suggests that he intended or appreciated any inversion of a load platform over a parallelogram linkage system or stowing the same beneath the truck when not in use [Finds. 16, 24, R. 666].

The platform 9 of Novotney '403 is connected to a pair of yokes 8, shown in Figure 3, the yokes having slots in their upper ends [Ex. C]. No portion of Novotney '403 in the specification or drawings discloses the configuration of any parts disposed in the yoke slots. Although defendant's expert thought there "would be some sort of a lug" going from the platform into the slots of the yokes, it was conceded by defendant, and recognized by the trial court, that no lug configuration was shown [Tr. 777, line 17-779, line 5]. Plaintiffs' expert testified that Novotney '403 nowhere discloses any hinge means permitting inverting the gate or platform [Tr. 891, line 14-892, line 8] and, if assumed, the device could not be fully raised and the vokes 8 would be rendered useless [Tr. 894, lines 16-22].

The court found that it is mechanically *possible* to invert the platform in Novotney '403, but not with substantially the same result as in Lugash '227 in suit [Find. 16, R. 666]. The phrase about mechanical possibility was contrary to plaintiffs' position that it was error as a matter of law and fact to so construe Novotney [R. 439-456]. In its opinion, the trial court concluded that such possibility is not "inherent" in Novotney "in any degree" [R. 563, line 20-R. 564, line 12; Find. 17, R. 666].

Defendant's brief refers to its Exhibits AM-1 and AM-2, comparing claims of Lugash '227 with what Novotney '403 allegedly "clearly shows" or what is allegedly "taught by" Novotney '403 (A. O. B. 27). But Figure 2 on both of these exhibits were admitted by defendant at the trial, *not* to be figures from the Novotney '403 patent [Tr. 750, line 11-751, line 16]. This is not pointed out in defendant's brief.

Peters, Narvestad and Jester.

Defendant contended that lifting lever arms, shown in Peters, Narvestad [Ex. C] and Jester [Ex. D], are the equivalent of parallel linkage systems such as are used in Lugash '227 [Tr. 720, lines 18-22; 784, line 24-787, line 10] but the court found non-equivalence [Find. 22, R. 667-668].

With regard to Peters [Ex. C], defendant's expert called the lifting arms a "linkage" while admitting it is not a parallel rule linkage system [Tr. 789, lines 18-25]. The patent itself refers to "lifting levers" [*e.g.*, Ex. C, Peters, Column 3, lines 18, 37, 52] and defendant's expert admitted the Peters device tilts the load carried by it as the platform swings through 55-58° change of angle [Tr. 792, lines 7-24].

With regard to Narvestad [Ex. D],* defendant's expert admitted it is a swingable lever arm type of device, and does not have a parallelogram linkage system [Tr. 796, line 19-797, line 3]. Narvestad shows two embodiments, as to both of which defendant's expert conceded there is a change in angle in the platform and arms as the device is raised and lowered between ground level and the level of the truck bed. According to him, this would be in varying degrees, but in the one case as much as 60° [Tr. 798, line 9-800, line 6].

With regard to Jester [Ex. D], defendant's expert admitted it has no parallelogram linkage system and that its platform swings through 140-150° change of angle in moving between raised and lowered position, with the result of dropping a load upside-down on the truck bed [Tr. 811, line 1-813, line 14].

At the trial, plaintiffs showed that in Lugash '227, for the first time, the lifting arms of a truck loader move to carry an inverted platform into and out of a stowed position, and the court so found [Find. 8, R. 664]. In opposition to this, the defendant relied on Peters, Narvestad and Jester. The court found that none of them has the same mode of operation as Lugash '227 in inverting and moving the platform under the truck bed [Finds. 19, 20; R. 667].

With regard to Peters [Ex. C], defendant's expert on cross-examination admitted that in order to store the device, there has to be an unlatching of parts, that other parts have to be shifted or slid with respect to other parts, that some runner block parts of the platform have to be folded inwardly before the parts 47

*Which was cited against the second Lugash patent in suit.

of the platform could be folded over onto lifting arms, the whole finally being manually shifted and slid onto a separate supporting shelf [Tr. 794, line 11-796, line 14].

With respect to Narvestad [Ex. C], defendant's expert admitted that once the platform was folded over, it has to be manually slid in and out on a telescoping tube structure to move it in and out of position under the truck bed [Tr. 800, lines 12-23]. With regard to Jester [Ex. D], defendant's expert admitted on cross-examination that in order to stow the device, there is involved the disconnecting of a pin 51, the folding of an arm section B over a section A, the disconnection of a latch, and the connecting of a separate rod 52 to hold the entire device in the stowed position [Tr. 813, line 18-814, line 11].

At the trial, plaintiffs showed, and the court found, that Lugash '227 in suit was the first loader to utilize a power means for moving the load platform into and out of a stored position [Find. 8, R. 664]. Against this, defendant relied on Peters, Narvestad and Jester. With regard to Peters [Ex. C], defendant's expert admitted on cross-examination that stowing the loader or getting it out ready for use is an entirely manual operation [Tr. 796, lines 15-18]. With regard to Narvestad [Ex. C], he admitted on cross-examination that the power means has no function in sliding the platform in and out [Tr. 801, lines 4-6].

On redirect examination, defendant's expert said that Jester [Ex. D] uses his power means in moving the platform into an out of the way position [Tr. 845, lines 10-16]. No such claim was made by him on direct. On recross-examination, he admitted that this was

based merely on his *interpretation* of Figure 3 of the Jester patent [Tr. 850, lines 20-23] and is not described in the patent specification. The Jester patent, itself, automatically prevents the power from ever being effective except when a load is put on the platform [Ex. D, Jester, Column 1, lines 12-17, p. 2, Column 2, lines 15-21].

Contrary to defendant's contentions, the court specifically found that Narvestad, Peters and Jester do not disclose or suggest any means for utilizing the power for moving the platform into and out of a stowed away position [Find. 21, R. 667].

C. Utility of Lugash '227 in Suit.

Prior to the Lugash stowable loader, the only type of loader to gain widespread commercial acceptance was the tailgate loader, which had been used for decades [Tr. 24, 58]. In these, the load platform also acts as a tailgate to close the rear end of the truck bed [Find. 10, R. 665]. The tailgate loader has no storage position. When not in use for loading, the platform travels in the vertically erect position behind the bed of the truck, as a tailgate [*e.g.*, Ex. C, Novotney '403, Column 2, lines 7-9, 20, 21].

Tailgate platforms do not always serve their intended function of acting as a tailgate. It was common to have a gate or door in front of the tailgate platform to hold articles in the truck [Tr. 77, lines 1-3; 39, lines 1-10]. With a tailgate, the device must be operated every time access is desired to the truck bed, even if the user only wishes to load or unload a very small or very light package for which a power loader is not needed [Tr. 33-34, 28]. Tailgates must be op-

erated in order to accomplish loading and unloading of a truck from a dock, are not adapted to take the heavy weight of a forklift truck, and can be damaged in such dock loading operations [Tr. 30, 52, 72, 73].

Defendant did not introduce any evidence of any loader that could be stored in an out-of-the-way position ever to come into successful use in the trucking industry, prior to Lugash '227.

At the trial, the court saw and examined embodiments of plaintiffs' stowable loaders and of tailgate loaders in operation at a loading dock [Tr. 854-865].

In 1957, plaintiff Max J. Lugash commenced manufacture and sale of his stowable loaders, assisted by a son [Tr. 291, 296]. Those products are called Tuk-A-Way loaders. Plaintiff Maxon Industries was formed in 1962. In 1957, Max Lugash sold 21 Tuk-A-Way loaders. Sales volume increased every year, Maxon Industries having sold 1,238 Tuk-A-Way loaders in 1964 for a sales volume of \$549,351 [Ex. 22, Tr. 292-296].

In the use of Tuk-A-Way loaders, it is not necessary to buy a separate tailgate since such are original equipment with the truck [Tr. 62]. A Tuk-A-Way loader need never be operated unnecessarily—it is available when one needs it and out of the way when not needed [Tr. 33, 49, 50, 71, 72]. Trucks in the general freight business equipped with the Lugash patented device save from 30 minutes to over one hour per day per truck as compared to a truck equipped with a tailgate loader [Tr. 28, 72]. The Lugash '227 loader is displacing tailgate loaders in some general freight business [Tr. 34] and rental companies are converting to Tuk-A-Way loaders [Tr. 54] because they are safer

[Tr. 52, 53] have greater utility and increase rental income [Tr. 50-53]. In dock loading operations, there is no possibility of damage to the Lugash '227 loader [Tr. 30, 52, 72, 73].

Defendant's infringing device, known as the Folda-Lift, was first sold in 1960 [Find. 13, R. 665]. Defendant came out with this device at the request of its distributors [Ex. 8, pp. 40, 41], after seeing the Lugash patent and plaintiffs' Tuk-A-Way loaders [Tr. 520, 574-581] and called it "The Newest" idea in mechanized loading, having all of the advantages of tailgates "WITH NONE OF THE DISADVANTAGES" [Tr. 614-617]. As compared to the Anthony dropleaf or Daybrook D. A., which are varieties of conventional tailgate loaders in which the platform travels as a tailgate [Tr. 815-818], defendant's president admitted that the infringing Folda-Lift has advantages in cost, simplicity, ground clearance and in the ability to get the platform out of the way [Tr. 535].

In its brief, the defendant has not referred to any of the above record, except to defendant's Exhibit EG, an advertising brochure for the Daybrook D. A. with a dropleaf tailgate, which exhibit defense counsel admitted is not prior art [Tr. 402, lines 14-19] and to Exhibit AD on the Anthony dropleaf, for which pamphlet no date has been established in the record, defendant's president being unable to recall when he received it [Tr. 510].

D. Infringement of Lugash '227 in Suit.

At the trial, defendant did not produce any sample of its Folda-Lift loader. Plaintiffs introduced their Exhibit 5, a one-fifth scale model of a Folda-Lift. Plaintiffs' expert testified, regarding infringement, to the effect stated in Findings 29 and 30 [Tr. 132-198, R. 670].

With regard to defendant's position that some models, at least, of defendant's Folda-Lift have a ramping linkage which does not produce a "level ride" (A. O. B. 50) defendant's president on cross-examination admitted that Folda-Lift Loaders with a slight ramping action are "level ride" loaders [Tr. 550, lines 1-20]. In the "ramping" models, the function of the linkage is to keep the platform level, so loads would not be tipped over [Tr. 553, lines 1-8]. During his deposition the president of defendant admitted that defendant's Folda-Lift loader has a parallelogram linkage [Ex. 8, p. 114, lines 15-24] deliberately designed to prevent tipping over of a load on the platform [Ex. 8, p. 85] and he admitted at the trial that both ramping and non-ramping linkages are parallelogram linkages [Tr. 611, line 5-612, line 6]. The difference between ramping and non-ramping linkages in the Folda-Lift device amounts to 3/16 of an inch in the center to center spacing on one link [Tr. Ex. 8, pp. 81-83].

With regard to defendant's position that the accused Folda-Lift device is a change only in a matter of a few degrees as compared to the defendant's prior conven-

tional tailgate loader (A. O. B. 46-47), it was brought out at the trial on cross-examination of defendant's president that in defendant's conventional tailgate loader when the platform is lowered to ground level, the platform cannot be raised through any degree of movement, let alone 90° [Tr. 596]. In the accused Folda-Lift device, when the platform is at ground level, the platform swings through 135° in order to invert it over the lifting linkage to enable it to be raised to the stored position [Tr. 596]. He also admitted that the accused Folda-Lift loader has a different platform [Tr. 602], has a different body spacer [Tr. 602] and has a different location of hydraulic lines and fittings to the lifting cylinder [Tr. 603-604].

ARGUMENT.

I.

Lugash '227 Is a Combination of Functionally Related Elements. The Basic Fallacy in Defendant's Position Is That It Requires Treating One Element of the Patented Combination as the Patented Invention Itself.

A. The Court Factually Found Lugash to Be a Combination of Functionally Related Elements.

Speaking broadly, the Lugash invention is for a combination of elements, all of which are functionally related both to act as a loader and to store the loader [Finds. 6, 7, R. 663-664]. More specifically, it is a claimed combination of elements which, for shorthand convenience at the trial, was referred to as the combination of a parallelogram linkage system and invertible platform [R. 531]. This shorthand expression is not a complete definition of the invention, since Claim 8, for example, also includes elements of power means, and connections between the parallel linkage systems and platform comprising a hinge means permitting inversion and a stop means to hold the platform in horizontally extended position. The claim was, of course, treated at the trial with all of its elements regarded as being material, as evidenced by the court's Finding 7 [R. 664]. In using this shorthand expression we mean the claimed combination as an entirety, with all its elements.

Defendant admits that the parts of the Lugash combination claim are functionally related for loading purposes. The trial court found that the several parts of the claimed combination are also functionally related for stowing purposes [Find. 8, R. 664]. At the trial, de-

fendant did not try to rebut the fact that the parts of the Lugash combination function both ways, as stated in Finding 8, but now defendant balks at the impact of this Finding. Defendant now tries to limit Lugash to the single feature of platform inversion (A. O. B. 6-7) but nowhere tries to demonstrate that the evidence at the trial does not support Finding 8 which states:

“Lugash patent '227 creates a new organization of individually old elements giving new modes of operation to the elements of the combination, never before seen in the truck loading art. For the first time, the power means moves a load platform into and out of a stored position. For the first time, the lifting arms of a truck loader function to move an inverted platform into and out of a stored position. For the first time, both the power means and the lifting arms of a truck loader are given a dual function, i.e., they are active elements in accomplishing movement of the inverted platform into and out of a stored position as well as being active in carrying out loading operations”. [R. 664].

Wherever, this finding says “for the first time”, it means just that. No prior art ever suggested the possibility of any of these “firsts”, let alone any combination of means for attaining such firsts [Find. 18, R. 666]. Now, as regards the presence and functional relationship of the elements in Lugash’s combination, particularly the power means and lifting arms, in the storing of the Lugash loader, defendant resorts to ridicule (A. O. B. 18, “When it is painted green”; “Why not a third mode for purpose of amusement?”, A. O. B. 38).

This question “of uniting old art parts or elements in such manner that they produce a new function or oper-

ation” is one of fact. *Beatty Saway Scaffold v. Upright*, 306 F. 2d 626, 629 (C.A. 9, 1962). Lugash’s combination functions for both loading and stowing and all of the elements work in both of these phases, as was physically demonstrated to the court [R. 852 *et seq.*]. The invertible platform is only one feature of the combination. Defendants’ ridicule will not erase the found facts that the power means, linkage systems, hinge means and stop means, as well as the invertible platform, are *all* elements of the combination, *all* functionally related for both loading and stowing purposes.

With respect to defendant’s reliance on *Calmar v. Cook* (cited as *Graham v. John Deere*, 383 U.S. 1, 86 S. Ct. 684) the facts found in this case make that case inapposite because the subject matter of Lugash ’227, as a whole, does not boil down to the single feature of platform inversion. Defendant made this contention at the trial [Tr. 701, 702] but unsuccessfully, as we have seen. The trial court rightly understood that

“if anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant.”

Aro v. Convertible Top, 365 U.S. 336, 344.

Paraphrasing *Pursche v. Atlas Scraper and Engineering Co.*, 300 F. 2d 467 at 477 (C. A. 9 1961) the trial court further understood that

“[Lugash] is not, as [defendant] apparently believes, claiming an improvement to a turning means that is old in the art, but instead is claiming what we have already determined is an entirely new combination that performs a new function over prior

art devices. Thus, the rule in *Lincoln Engineering Co. of Illinois v. Stewart Warner Corp.*

“ . . . that . . . ‘the improvement of one part of an old combination gives no right to claim the improvement in combination with other old parts which perform no new function in the combination has no application’ ”.

“Rather, the correct principle is the one stated in *Expanded Metal Co. v. Bradford*, 214 U.S. 366, 381, 29 S.Ct. 642, 656, 53 L.Ed. 1034 (1909) ;

‘It is perfectly well settled that a new combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent.’ ”

Pursche v. Atlas Scraper & Engineering Co., *supra*, page 477.

Cf. Roth v. Roberts Manufacturing Co., 298 F. 2d 200, 201, 202 (C.A. 9, 1961). *Pursche* was good law before *Graham v. Deere*, and remains unimpaired as controlling authority in this case, where Lugash has given this art the first practical stowable loader.

B. As Both the Patent Office and Trial Court Saw, Lugash Is Entitled to His Combination and No Prior Art Restricts Him to Merely the Improvement of an Element.

We have demonstrated the basic error in the defendant's position in attempting to characterize Lugash's claims as limited to the sole feature of platform inversion. Lugash's claims *cannot* be so characterized. He was permitted by the Patent Office to claim the entire combination of invertible platform and parallel linkage systems, to use our shorthand expression. The history

of the prosecution of the Lugash application in the Patent Office [Ex. A] does not reveal a divergence of position, as was the case with the Scoggin patent claims held invalid in *Calmar Inc. v. Cook Chemical Co.*, *supra*. On the contrary, claims to the basic combination of invertible platform and parallel linkage systems were allowed as filed [Ex. A, p. 20]. Not only did Lugash not have to retreat, he was allowed additional new claims which broadened the definition of his unique combination [Ex. A, pp. 20-25], *e.g.*, patent claim 8.

As contrasted to *Calmar*, where “the exact basis of the district court’s holding” of validity of the patent in suit was “uncertain” 86 S. Ct. at page 700, the district court in this case, with certainty and clarity, made findings on the technical facts.

The broad distinction between the facts in this case and the facts in *Calmar v. Cook* and the basic defect in defendant’s position is conclusively demonstrated by consideration of the two claims held invalid by the Supreme Court in *Calmar*. Those are set out at 220 F. Supp. at pages 417-418 and a reading of them is essential to a proper understanding of the Supreme Court’s action in the *Calmar* case.

After reading the Scoggin patent claims, the nature of the “substantial divergence” of the patentee’s position, which was remarked upon by the Supreme Court, 86 S. Ct. at page 701, is made clear. Scoggin was estopped from claiming the entire combination of spray pump and overcap in broad terms, because he was forced by the Patent Office to abandon broad claims. He ended up only with what is known as a Jepson type claim which specifically recited as the exclusive patentable difference in his narrowly defined combination, a

sealing arrangement comprising a combination of an annular retainer and a cup-shaped hold down member. Scoggin's claims did not and could not broadly claim the entire combination of spray pump and over cap — his device was only one of several previously known shipper-sprayers made up of the same combination.

The trial court found that Lugash's invention is a new combination of elements functionally related for both loading and stowing purposes and with the elements for the first time being active in both phases [Find. 8, R. 664]. Nothing in the file history estops Lugash from asserting all of this as his invention. There is not here any divergence of position, such as was present in *Calmar*. Instead, this case is controlled by the principles of *United States v. Adams*, 86 S. Ct. 708. Here, as there, is a combination of functionally related elements and plaintiffs' reliance on this as the invention of Lugash is not "an afterthought" of trial counsel nor any "divergence" of position. Lugash, like Adams, provided a *first* practical device of its kind.

C. The Lugash Claims Comply With the Statute.

Defendant argues that the Lugash claims do not meet the requirements of 35 U.S.C. 112. It is alleged they do not "require" the platform to be swung, when it should be swung, what should be done after it is swung, or that power means should be used to swing it (A. O. B. 28). Defendant's position seems to be that patent claims are indefinite if they do not repeat, *in toto*, the sum and substance of the patent specification and drawing.

Since "it is fundamental that claims are to be construed in the light of the specification and both are to be read with a view to ascertaining the invention"

United States v. Adams, 86 S. Ct. at page 713, the benefit of this fundamental proposition cannot be denied to Lugash, as defendant argues (A. O. B. 28). Note, moreover, that three pages later in its brief (A. O. B. 31), defendant relies on this proposition on behalf of prior art.

Lugash's claims clearly and definitely define a combination of functionally related elements. Claim 8, for example, is easily parsed into the form set out in Finding 7 [R. 664]. There is clearly defined an assembly of mechanical parts in certain relationships to one another and with specified movements. Now in *United States v. Adams*, *supra*, the claims omitted all mention of the essential element of an electrolyte, but the claims were upheld. In *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, the combination claim at issue set forth a combination of elements but omitted all mention of "tipping power", an important issue in the suit. The claim was upheld. Thus, patent claims can be valid in omitting an element and omitting functions of elements. *A fortiori*, Lugash's claims are valid. No essential element is omitted and the interrelationship of the parts is clearly defined along with their movements.

"We are directed to *Goodman v. Super Mold Corp. of California*, 103 F.2d 474 (9th Cir. 1939), as authority for the proposition that a claim is invalid unless it teaches the entire machine. We do not so read that case".

Pursche v. Atlas Scraper & Engineering Co., *supra*, 300 F. 2d 467 at pp. 475, 476.

As *Pursche* says, a claim need not include all novel elements in a machine.

In *Graham v. Deere* and *United States v. Adams*, the Supreme Court reaffirmed the validity of its precedents regarding patentability of combination inventions. In the case at hand, it is true that Lugash made a new combination of functionally related elements having new modes of operation, producing new and useful results, and constituting a marked advancement in the useful arts. These *facts* are beyond challenge in this court in view of defendant's failure to try to show a lack of substantial support for them.

The trial court applied the correct legal criteria, including precedents of this court, after acquiring first-hand knowledge of the facts as a result of an extensive trial. Such cases of this court as, for example, *Pursche v. Atlas Scraper & Engineering Co.*, *supra*, are of controlling application here to uphold Lugash's new combination in which as the court found, the results are the product of the combination and not a mere aggregate of several results.

Under these circumstances, "it must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were known and in common use before the combination was made". *Hailes v. Van Wormer*, 87 U. S. 353, 368 (1873).

II.

For Inventive Thought, Creating a New Combination With New Functions and Results, Protection Should Be Accorded to Lugash for Significantly Advancing the Useful Arts.

“In every case, the idea conceived is the invention. Sometimes . . . a series of experiments is necessary to develop and perfect the invention. At other times, as in the case under consideration, . . . the invention may be reduced to paper in the form of an intelligible drawing, when nothing more is necessary than the preparing of patterns and working drawings, and the embodiment of the original idea in a machine constituted accordingly . . .”

Gill v. United States, 160 U. S. 426, 434.

The court found that it was a simple matter for defendant, having knowledge of Lugash's patent and commercial devices, to convert a tailgate loader into the infringing Folda-Lift [Find. 25, R. 669]. The court correctly recognized however that this was not persuasive or any evidence of obviousness. More significantly, the simplicity of this conversion was recognized as not negating the quality of Lugash's conception as a marked advance in this art. Once Lugash's conception was known, of course it was a simple matter to make such conversion.

“ . . . The conception of the invention consists in the complete performance of the mental part of the inventive act. All that remains to be accomplished, in order to perfect the act or instrument, belongs to the department of construction, not invention.”

Bac v. Loomis, 252 F. 2d 571, 576 (C.C.P.A. 1958).

This principle is well established in our circuit. As examples, attention is drawn to *Pursche v. Atlas Scraper supra* and *Patterson-Ballagh Corp. et al. v. Moss et al.*, 201 F. 2d 403. Supreme Court standards with respect to this point are shown, for example, by *Goodyear v. Ray-O-Vac*, 321 U.S. 275, 64 S. Ct. 593; *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, *supra*; and *Hobbs v. Beach*, 180 U.S. 383, 21 S. Ct. 209. The latter case is particularly pertinent. It points out that if a worker of ordinary skill in the art, having the prior art before him, makes a combination not suggested by that prior art, he may thus be converted into an inventor. The court said

“ ‘Would the thought enter the mind of the skilled mechanic with the Dennis and York device before him on his workbench; and if it did, would it not be a creative thought whose presence would convert the mechanic into an inventor?’ ” 21 S. Ct. at 413.

Defendant's position in calling the Lugash device a “backward step”, rather convincingly shows the high order of Lugash's conception, which is the invention. Implicit in defendant's argument is the admission that the level of ordinary skill in the art, obsessed as it was with the idea of tailgates, would never have come upon Lugash's conception of a combination of parts functionally related for both loading and stowing purposes. The only loaders previously to come into commercial widespread use were tailgate loaders [Find. 24, R. 668], whose devisors were patentwise [Tr. 605-610]. These tailgate loaders were on the market for decades and yet, as the court found, it never occurred to any one of

these patentwise experts or their companies to create the combination of the Lugash patent.

“This very fact is evidence that the man who discovered the possibility of their adaptation to this new use was gifted with the prescience of an inventor. While none of the elements of the Beach patents—taken separately or perhaps even in a somewhat similar combination—was new, their adaptation to this new use and the minor changes required for that purpose resulted in the establishment of practically a new industry and was a decided step in advance of any that had theretofore been made.”

Hobbs v. Beach, 180 U.S. 383, 392, 21 S. Ct. at 413.

And now the industry has the Lugash Tuk-A-Way loader, which is not only displacing tailgate loaders in some freight business [Tr. 34], but which is also creating a market for power loaders in the truck rental business, which had scarcely been penetrated by tailgate loaders [Tr. 49, 50-54], after decades.

We do not mean to detract from the prior commercial significance of tailgate loaders, for

“This is not a case where a single inventor preceded all the rest and struck out something which underlay all the others. It is one of the great majority of cases involving patents in which progress in the art has been made step-by-step, and many have discovered and patented methods and combinations to accomplish the desideratum. It is a just and equitable rule that where several inventors, as in this case, Ingalls, Phillips and Hunt and Christy, and many others, have formed and

patented different combinations which accomplish the desired result with different degrees of operative success each should be protected in his own combination so long as it differs from those of his competitors and does not include theirs. Christy's mode of operation and combination fall far within this rule, *and they are more entitled to protection than those of the other inventor because they constitute the best and the most useful boxcar loaders*; and, while others may be permitted to make use and sell their patented combinations, *they ought not to be allowed to appropriate that of Christy.*" (Emphasis added.)

Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 F. Rep. 362, 376 (C.A. 8, 1914).

III.

Defendant's Spontaneous Appraisal of Lugash '227— the Newest Idea in Mechanized Loading With All of the Advantages but None of the Disad- vantages of the Prior Art—Is Strong Evidence of Invention.

On the whole record, not one material statement of alleged fact employed in defendant's "backward step" argument (A. O. B. 43-45) is accurate.

First, it never was plaintiffs' position that the Lugash device could or should serve as a tailgate. He avoided that obsession of his predecessors. What defendant characterizes as an "admission" of "failure" of Lugash to do so is mere rhetoric. Here, as elsewhere, defendant characterizes as "admissions" matters about which there was no dispute at the trial.

Second, defendant extensively bases argument on its Exhibits AD and EG, neither of which is prior art. Of Exhibit EG, defense counsel said “It is obvious this exhibit is not prior art” [Tr. 402, lines 18, 19]. Exhibit AD is undated and no foundation was laid for it in point of time [Tr. 510, lines 12-18].

Next, defendant asserts that the Anthony Dropleaf of Exhibit AD and the Daybrook D.A. of Exhibit EG folds to an out-of-the-way position *beneath* the vehicle. This assertion, based on exhibits which are not prior art, is made repeatedly (A. O. B. 8, 13, 26, 44). *The exhibits nowhere say or show this.* As for the device itself, defendant’s president said on cross-examination that he couldn’t recall ever operating it [Tr. 512]. Nevertheless, he felt at liberty to speculate that when the platform is hanging vertically that the lower edge would swing back and forth and thus, perchance, one *edge* of the platform might go beneath the vehicle [Tr. 614]. He admitted that the upper edge of the platform, flush with the truck bed, cannot be beneath the truck bed [Tr. 614].

Defendant’s present position with regard to the dropleaf idea is inherently illogical. The dropleaf tailgate isn’t even out of the way for dock loading. It has to be operated to drop the tailgate into dropleaf position. This is lauded by defendant as a useful function of this tailgate for dock loading purposes (A. O. B. 44; Tr. 815, lines 17-23]. On the other hand, when plaintiffs’ Tuk-A-Way loader is in the stowed position, defendant calls it useless and a backward step. Indeed, Lugash’s loader patent is so useless that defendant has sold over one-half million dollars worth of these useless infringing devices [Ex. 20].

Defendant's position with respect to the dropleaf type of tailgate loader is about as firm as quicksilver. On appeal, defendant relies on this heavily. At the trial, defendant's patent expert, also a man of skill in this particular art, thought so little of it that he never took the trouble to see a device of this type [Tr. 814, line 24-815, line 2]. A dropleaf tailgate is in the prior art, but only to the extent of the Roberts patent [Ex. D] which was cited against Lugash '196—the improvement patent. This expert thought so little of Roberts as prior art that he didn't "seriously" study it as it wasn't "real important" [Tr. 815, lines 3-8].

All that remains now to be considered of defendant's allegations of fact regarding its backward step argument is the assertion that a user of the Lugash device has to put additional separate gates on the back on his truck but that such gates are not necessary with tailgate loaders (A. O. B. 44, 45). *Defendant's* own exhibits show no less than eight separate instances of a truck equipped with a tailgate *and* also equipped with something in front of the tailgate acting as the tailgate and wholly defeating the tailgate purpose of the tailgate loader [Ex. AB; Ex. AC, pp. 4, 6; Ex. EG, pp. 1, 2, 10, 19, 20].

If we are to depart from the record as defendant has, trucks equipped with tailgate loaders can be seen travelling along our streets and highways, every day, frequently having van doors, scissors link fences, or chains closing the rear end of the truck and rendering the tailgate platform *useless* for tailgate purposes. Contrary to defendant's position, the truth of this is evident from testimony of Mr. Grasse which defendant chose to ignore in quoting other parts of his testimony. Defend-

ant says a user of the Lugash invention is put to the added expense of acquiring a tailgate (A. O. B. 43). The fact is, as Mr. Grasse said, that a truck comes equipped with gates—"we have the original gates which came with the truck" [Tr. 62, lines 1-2].

**An Infringer May Not Deny the Utility of the Invention
He Has Copied.**

While not so phrased, the defendant's backward step argument is an attack on the utility of the Lugash patent. An infringer is not at liberty to make this argument.

"The fact that it has been infringed by defendants is sufficient to establish its utility, at least as against them."

Lehnbeuter v. Holthaus, 105 U.S. 94, 96.

Defendant has not specified any alleged error with respect to Finding 12 [R. 665] that before defendant's infringement commenced, defendant's president knew of plaintiffs' Tuk-A-Way model and of Lugash patent '227. Defendant rejected the dropleaf tailgate in favor of Lugash '227 [Tr. 527-528]. As we have shown, and contrary to defendant's argument, the dropleaf tailgate cannot be folded out of the way or *beneath* the vehicle. It is a tailgate and all such must be operated at every stop irrespective of any requirement for its actual use in handling freight [Tr. 817] and before any dock loading can be done. At best, and *only* for purposes of dock loading, the tailgate can be pivoted to a hanging position in which it must still be run over by heavy tow motors and fork lift trucks [Tr. 815-817]. The device cannot be stowed, it must travel with the platform in the upstanding tailgate position. On cross-examination,

defendant's president attempted to evade admitting clear advantages of the Lugash concept over the dropleaf tailgate loader but was ultimately forced by the court to do so [Tr. 534, line 1-537, line 12].

The defendant's position is like that of the infringer which was rejected in *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U.S. 428, 31 S. Ct. 444 at page 450. Here, the defendant Santa Anita uses the Lugash patent, not the Roberts' dropleaf patent, which it rejected as a possible alternative. Such use by the defendant is a strong concession to the advance of Lugash beyond the prior art and of its novelty and utility.

"It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done."

Diamond Rubber Co. v. Consolidated Rubber Tire Co., *supra*, 220 U.S. 428, 31 S. Ct. 444 at 450.

Lugash's loader is so "useless" and "backward" that defendant advertised its infringing Folda-Lift device as "having all of the advantages of conventional tailgates with none of the disadvantages" and that, although out of the way, it is nevertheless "immediately available for use" and further, that the concept is "The Newest" idea in mechanized loading [Exs. 9, Y; Tr. 614-618].

Defendant, by "converting" its tailgate loader to the infringing Folda-Lift thereby renders the platform useless for tailgate use. This is surely a convincing demonstration of the true value of Lugash's advance of the art.

"Finally counsel assail the validity of Christy's patent on the ground that there was no invention

in the production of the principle and combination it discloses; that any mechanic skilled in the art could have conceived and produced them. But the record and the fact that Phillips and Hunt, officers of the defendant and inventors of the scraper devices patented to them in 1896 and 1899, men who have been engaged for more than 15 years in searching for the best device to load box cars, have lately mounted in the sides of their old trough in place of their scraper the steel cross-piece carrier of Christy with its upstanding partitions, *and have thereby rendered the bottom of their trough useless*, have convinced us that Christy's patent combination is the most efficient and economical box car loader yet produced." (Emphasis added).

Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 F. Rep. 362, 375.

Distorting the facts, defendant argues a backward step. On the basis of a first hand knowledge of the evidence as a whole, the court found that Lugash '227 is a marked advance in the art and entitled to a liberal construction. Of these mutually exclusive propositions, we submit that the court's conclusion is correct.

"In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery, which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine, may be very meritorious, *and entitled to liberal treatment*". (Emphasis added).

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45, 63, 43 S. Ct. 322, 328.

IV.

The Trial Court's Careful and Thorough Inquiry Into the Facts Strengthens the Presumption of Validity. The Mere Fact That Art Showing One Element Was Not Cited Is Not Evidence of Its Pertinence to the Lugash Combination.

“The presumption of a patent's validity, which arises from its issuance by the Patent Office, is strengthened by the finding of validity by the District Court”.

Neff Instrument Corporation v. Cohu Electronics, Inc., 298 F. 2d 82, 87 (C.A. 9, 1961).

Defendant argues that “the trial court erred in giving significance to the presumption of validity of the Lugash '227 patent” because of the rule in *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F. 2d 632, 634 (C.A. 9, 1951), that even one prior art reference, which has not been considered, *may* overthrow the presumption of validity. Here, defendant has misconstrued the trial court's opinion, the effect of the statutory presumption involved, and the holding in the rule of *Jacuzzi*.

Let us assume, *arguendo*, that defendant's prior art was more pertinent than that considered by the Patent Office. From this, it does not follow, as defendant contends, that the statutory presumption of validity is automatically overthrown (A. O. B. 20-25).

“Appellants' contention appears to misconstrue the presumption involved. The rule is that the presumption always applies, but when it is shown that the Patent Office did not have prior patents before it, such patents may rebut the presumption of validity. This depends, of course, upon whether the

undisclosed prior patents are substantially the same as the later patents in question. Thus, at the outset the presumption is still applicable. It remains to be seen whether that presumption has been rebutted by an undisclosed and significant prior patent. *We think as indicated by the Trial Court that consideration of the illustrative drawings of the Martin patent should leave anyone unconvinced of substantial similarity of the Martin patent with Appellees' patent*". (Emphasis added).

Beatty Safway Scaffold Co. v. Upright, Inc.
(C.A. 9, 1962), 306 F. 2d 626, 628, 629.

In *Beatty*, the more pertinent Martin patent was held not to rebut of the presumption of validity because of the lack of the requisite substantial similarity. And in *Neff Instrument Corporation v. Cohu Electronics, Inc.*, *supra*, where the court said: "But defendant presents few more *pertinent* references to prior art than were considered by the Patent Office" (emphasis by court) 298 F. 2d 86, the patent in suit was upheld. Obviously, defendant's plea for a mechanistic application of the rule of *Jacuzzi* is improper and this court has expressly said of such contention "we disagree". *Whamo Manufacturing Co. v. Paradise Manufacturing Co.* (C.A. 9, 1964), 327 F. 2d 748, 749. That the Examiner in the Patent Office did not cite against Lugash '227, a prior art loader having an invertible platform does not affect the presumption of validity of the Lugash *combination*. Non-citation of such art does not even mean that the Examiner failed to consider such art.

Davis v. Buck-Jackson Corporation, 138 F. Supp. 908, 913 (E.D. N.C. 1955);

United States Pipe & Foundry Co. v. James B. Clow & Sons, 205 F. Supp. 140, 152 (N.D. Ala. 1962);

Elgen Manufacturing Corp. v. Grant Wilson, Inc., 285 F. 2d 476, 479 (1961);

Detroit Appliance Co. v. Burke, 4 F. 2d 118, 122 (1925).

Defendant charges that the trial court “completely ignored” the rule of *Jacuzzi* (A. O. B. 24). Why then did the trial court make such frequent reference to “non-cited” art in its opinion [R. 563, lines 3-4; 564, lines 19-21; 566, lines 6-7; 567, line 25-568, line 2; 569, lines 3-4; 570, lines 21-29]. Does defendant mean that the trial court completely ignored the portions of both plaintiffs’ and defendant’s post-trial briefs regarding the point? [R. 432-434, 486-492]. On the contrary, the trial court paid scrupulous attention to this rule of law. The court understood and found that the Lugash ’227 patent claims a combination of functionally related elements having new modes of operation leading to new results [Finds. 6, 7, 8, R. 663-664], none of which were suggested by the cited or non-cited prior art singly or in any combination [Find. 18, R. 667]. The trial court properly applied the law as indicated by *Beatty*, i.e., upon consideration of the prior art tailgates and lever loaders relied on by defendant, of which the most that could be said is that it showed the element of an invertible platform, this would leave anyone unconvinced of substantial similarity of that prior art with the Lugash combination of functionally related ele-

ments. Lugash has a different kind of loader — the first practical power loader that can be stowed.

Against the statutory presumption of validity, on what prior art did defendant rely to sustain its burden of proof? First, let us consider the group comprising non-cited Shadbolt '822, Ducondu '011 and Ducondu '473. These are the specific subject of Finding 23 [R. 668] to the effect that they are primitive devices, only manually operable and erectable by disassembly and reassembly and not disclosing the combination, structure, functions of parts, modes of operation or results of the Lugash generic patent. Defendant has not specified any alleged error in this finding and so has abandoned reliance on these as prior art, notwithstanding defendant's reference to these patents in its brief (A. O. B. 34, 43).

Next, there are the dropleaf tailgates of defendant's Exhibits EG, AD and the Roberts patent of Exhibit D. Defendant's brief makes frequent and extensive references to the Daybrook D. A. of Exhibit EG and the Anthony Dropleaf of Exhibit AD, all of which is worthless as neither of these exhibits is prior art. Defendant's brief nowhere bases this line of argument on the Roberts patent of Exhibit D, which is prior art, but of which we should remember that defendant's expert thought it of so little value that he didn't seriously study it as it "wasn't important" [Tr. 815, lines 3-8].

What remains available to defendant as prior art on this appeal is Novotney '403, Jester, Narvestad, Wood

'135 and Peters, as prior art patents, and the defendant's prior conventional tailgate loaders.

Manifestly, the validity of Lugash '227 turns on the facts. *Graham v. Deere*, 383 U.S. 1, 86 S. Ct. 684, 687. With regard to the patents remaining available to defendant, their scope and content as prior art and the difference between that prior art and Lugash '227 claims at issue were sharply contested issues of fact. The court made Findings 6-8, 10, 11, 15-22 regarding what this prior art was and what Lugash did to improve upon it [R. 663-668]. These are technical facts stated in these findings.

The findings are contrary to the alleged evidentiary facts stated by defendant in its brief regarding the Lugash patent in suit, Novotney '403, Peters, Narvestad and Jester and other prior art. Additionally, plaintiffs dispute the inferences which defendant seeks to draw from its misstated facts. Under these circumstances, expert testimony is necessary to a fact determination by a court. *Empire Electronics v. United States*, 311 F. 2d 175 (C.A. 2, 1962). Accordingly, this court cannot adopt defendant's version of those disputed facts without assuming the role of a trial court, which this court would not do even if all of the proof was merely documentary. *Hycon Manufacturing Co. v. H. Koch & Sons* (C.A. 9, 1955), 219 F. 2d 353, 354.

V.

Lugash '227 Teaches and Claims a Combination of Functionally Related Elements for Stowing and Loading Purposes Which, Under Controlling Precedent of This Court, Is Not Anticipated or Rendered Obvious by a Prior Combination of Elements Not Producing the Same Result.

Defendant refers the court to its Exhibits AM-1 and AM-2. Each has a Figure 1 and a Figure 2, labeled as Novotney '403, but *neither* of those figures is actually taken from the Novotney patent. Defense counsel has omitted all mention of this fact which he admitted at the trial regarding Figure 2 [Tr. 750-751]. Further, defendant's patent expert testified on cross-examination:

"I wouldn't want to assume anything about Novotney that isn't shown in the patent. That is a patented structure and I don't know about the hardware itself." [Tr. 783].

Defendant's brief has done precisely what defendant's patent expert rightly said should not be done, because "when it is sought by means of prior patents to ascertain the state of the art, 'nothing can be used except what is disclosed on the face of those patents. . . .'" *Mohr v. Alliance Securities*, 14 F. 2d 799, 800 (C.A. 9, 1962). Defendant's Exhibits AM-1 and AM-2 show Novotney's platform inverted over his parallelogram linkage system, despite the admission of defendant's expert that no prior patent showed any such combination [Tr. 786-787]. Only Lugash shows it. Defendant argues

that Novotney '403 "irrefutably" "shows" or "teaches" or "describes" a platform that can be inverted over a parallel rule linkage system (A. O. B. 27, 29, 31) ignoring that both its experts were forced by the court to admit that this is not so [Tr. 483-486, 779]. Defendant says Novotney teaches "the same combination for the same purpose" (A. O. B. 27) when Novotney, titled "End Gate Loader", is totally silent on any aspect of a stowable loader.

A sharp distinction must be made between what is actually disclosed by Novotney '403 and the defendants testimony thereon. Applicable principles of law require such a distinction *Mohr v. Alliance Securities Co., supra*. The trial court closely distinguished the actual disclosure of Novotney and defendant's expert's "argument" thereon [Tr. 786]. It is in this context that the court properly and correctly found "nothing in Novotney '403 suggests that he intended or appreciated any inversion of a load platform over a parallelogram linkage system" and that "inverting of the platform over the parallel linkage system is not inherent in Novotney '403". [Finds. 16, 17, R. 666]. This court has recently reaffirmed that:

"Anticipation is strictly a technical defense. Unless all of the same elements are found in exactly the same situation and united in the same way to perform the identical function in a single prior art reference there is no anticipation."

Walker v. General Motors Corp., F. 2d,
149 U.S.P.Q. 472, 473 (C.A. 9, 1966).

Bearing in mind the distinction between what Novotney actually fairly discloses and defendant's argument, Novotney is worthless as an anticipation. It is only a tail-gate like those cited by the Patent Office.

The court found "it is mechanically *possible* to invert the platform in the said Novotney device but not with substantially the same result as in plaintiffs' patent '227" [Find. 16, R. 666]. This is only half right, *i.e.*, it is not possible, as a matter of fact, to invert the platform in Novotney with the structure actually disclosed. On the other hand, assuming *arguendo*, that such inversion were possible, it is nevertheless true, as the court found, that it would not be with substantially the same result as in Lugash patent '227.

Obviously, for the platform of Novotney '403 to be able to invert it would have to have the right kind of hinge means [Tr. 893, 894]. Although Novotney does not say to do so, let us assume that it is desired to invert this platform. His structure, without alteration, prevents it [Tr. 892-898].

The platform 9 of Novotney '403 is connected to a pair of yokes 8, shown in Figure 3 (not to the parallel linkages). These yokes have slots in the upper ends of one arm. Referring to Figure 1, there is a hinge pin, unnumbered, interconnecting the platform and the yokes.

No portion of Novotney '403, in the specification or drawing, discloses the configuration of *any* parts disposed in the yoke slots and interconnecting the end gate 9 and the yokes by means of connection to the unnumbered hinge pins. Although defendant's expert speculated that there "would be some sort of a lug" going from the platform into the slots of the yoke, it was

conceded by defendant and recognized by the trial court that no lug configuration is shown [Tr. 777, lines 17-779, line 5] and this is “crucial” [Tr. 892]. Further, there is absolutely no disclosure of what the shape of the floor of the slots in the yokes 8 actually is and only one end of the slot can be seen.

Defendant’s Exhibit AO-6 is a photographic enlargement of Figures 1 and 2 of Novotney ’403. Defendant did not enlarge Figure 3 of this patent. As we think this omission is significant, such an enlargement was attached as an exhibit to plaintiffs’ trial brief [R. 482]. It shows that the configuration of the visible end of the yoke slot actually provides an abutment preventing inversion of the platform 9. Red dotted lines have been added to the figures to make this point more clear.

Referring to the enlargement of Figure 3 of Novotney, the upper edge of the brace 11 is located in a plane beneath the bottom of the visible end of the slot in the yoke 8. The red dotted outline is an extension of the plane of the upper edge of the brace 11 and intersects the yoke distinctly below the level of the only visible end of the slot bottom. The hole to receive the hinge pin for the platform appears to be at about the same level as the slot bottom at the visible end of the slot. Now, although defendant’s patent expert rightly says that we shouldn’t assume anything about Novotney that isn’t shown in the patent, let us assume that Novotney has lugs extending into the slots, as he did. The upper edge of such lugs turning on the hinge axis and coming into contact with the visible end of the slot bottom, prevents raising beyond a vertical position. Platform inversion is not mechanically possible with the visible geometry of the Novotney ’403 device.

Defendant claims for Novotney a power of platform inversion as to which the patentee himself is silent, as the trial court found. So, too, the infringer in *Diamond Rubber v. Consolidated Rubber Tire* claimed that if “tipping power existed in the Grant patent [in suit] it existed in prior patents”, 220 U.S. at page 437, where both the Grant patent and the prior art were silent on “tipping power”. The Grant patent was upheld by the Supreme Court. *A fortiori*, as Lugash clearly teaches what Novotney was clearly silent about and ignorant of, he is entitled to the protection of his patent.

In the first place, there is no evidence that Novotney devices, commonly available in the market, brought about Lugash’s result and, in the second place, if Novotney did so under unusual conditions, accidental results not intended and not appreciated do not constitute anticipation. *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45 at page 66. “The law requires that inherency may not be established by possibilities or probabilities. The evidence must show that the inherency is necessary and inevitable”. *Interchemical Corp. v. Watson*, 145 F. Supp. 179, 182. The trial court was correct in finding that inversion is not inherent in Novotney consistent with *Application of DeJarlais*, 233 F. 2d 323, 329 (C.C.P.A. 1956); *Wasberg v. Ditchfield*, 155 F. 2d 408, 411 (C.C.P.A. 1946); *In re Thatcher*, 150 F. 2d 572, 574 (C.C.P.A. 1945); *Application of Filstrup*, 251 F. 2d 850, 853 (C.C.P.A. 1958); and *Lighthall v. Watson*, 175 F. Supp. 258, 259 (D.C. 1959).

If such mechanical inversion were a possibility, then why did not defendant bring in a Novotney ’403 commercial device, *i.e.*, an Anthony loader, before the court?

Defendant's president saw them [Tr. 608-610]. Because he admitted that he never saw *any* Anthony devices in which the platform could invert over the parallelogram linkage systems [Tr. 610]. As shown by defendant's evidence, Mr. Novotney has been a patent-wise worker in this field and has several tailgate patents [Ex. D, Novotney '993, '424]. Novotney patents were "the biggest thorn in [the] side" of defendant's patent expert when he was prosecuting patent applications on tailgate loaders [Tr. 783]. Surely, it stretches credibility to argue that patent-wise Mr. Novotney, seventeen years before Mr. Lugash, actually made the Lugash invention but didn't bother to describe it or claim it. The Supreme Court said of a like argument that such hypothesis is "inexplicable". *Loom Company v. Higgins*, 105 U.S. 580, 595.

Lugash was an innovator, not a follower. *Pointer v. Six Wheel Corporation*, 177 F. 2d 153, 161 (C. A. 9, 1949). As regards the Lugash concept, Novotney was a follower and not an innovator. On March 9, 1965, the day the trial of this action started, Mr. Novotney had issued to him Patent No. 3,172,549, entitled "Tuck-Away Tailgate", and against his patent Lugash '196 is cited as a reference. The Anthony Company, for whom Mr. Novotney invents, did not introduce its stowable loader until years after the patented Lugash loader had been introduced to the market [Tr. 539].

VI.

The Only Possible Way to Make Lugash '227 Out of the Prior Art Is to Reconstruct Defendant's Proposed Combinations of Patents in the Light of Lugash, in Violations of Rulings of This Court.

Assume, *arguendo*, that Novotney had the requisite hinge means. In other words, let us consider defendant's proposed combinations of Novotney '403 with prior patents such as Narvestad, Peters or Jester, showing invertible platforms on lever arm loaders. In so doing, it should be remembered that the concept of such combination is not found in the prior patents themselves [Find. 18, R. 667]. The resulting device still could not be moved into tucked away position. The Novotney '403 platform, over the yokes 8, would hit the lower edge of the rear cross-piece D of the truck and could not enter under the bed of the truck. The inverted platform, assuming that it could invert, could not even be raised to such position as to strike the cross-piece D. Before rising to that position, the platform would contact the truck frame, unless, of course, one assumes [*e.g.*, Deft. Exs. Am-1, AM-2] that the platform is so small in the front to rear dimension as to be worthless for loading purposes. Moreover, the platform of Novotney is not pivotally connected to the parallelogram linkages. Instead, it is connected to the pair of yokes 8 which are provided by Novotney for the specific purpose of disposing the platform 9 rearwardly of the bed of the truck and to permit it to act as the end gate "against

the rear of the vehicle" (Novotney, p. 1, col. 2, lines 5-21). The yokes 8 of Novotney are rendered useless by defendant's proposed inversion of the platform, as plaintiffs' expert testified [Tr. 894].

Suppose we throw away Novotney's yokes 8 and attach the platform 9 to the parallelogram linkages. Then the platform is useless for loading purposes—it would be *prevented* from ever rising to the level of the truck bed because its upper face would be stopped by contact with the member D of the truck. Note should also be taken of the fact that in a tailgate loader such as Novotney's it is essential that when the parallel linkage arms are fully raised, that the platform can then be raised to a vertical position to close the rear end of the truck. By contrast, in Lugash's loader, when the lifting arms are fully raised with the platform disposed at the level of the truck bed, it is impossible to raise the platform at all. Note should also be taken of the difference when the device is in the lowered position. In tailgate loaders, and this is true of all of them, the platform cannot be raised upwardly at all from the horizontal position. In Lugash '227, the platform can, of course, and must be inverted into superposed position with respect to the lifting arms, thence to be raised into the stowed position.

Lugash discloses and teaches a combination of elements all of which are functionally related for both loading and stowing purposes; makes the power means an active element in both loading and stowing; utilizes the lifting arms both for loading and for stowing. Where is there a scintilla of suggestion of Lugash in Novotney, Peters, Jester, Narvestad, and all other prior art?

Except for defendant's reliance on Novotney, it should be so obvious as not to require any statement that Lugash's idea never dawned on Novotney in his '403 patent. There is absolutely nothing in Novotney '403 which would suggest the Lugash concept to any mechanic of ordinary intelligence *even* if he were examining it for that purpose. He would have to abandon, totally, the objectives of Novotney and eliminate the yokes 8, cut through the rear member D, lengthen the links 10, cut away interfering parts of the under carriage of the truck, move the braces 11 on to the vertical links 10 and then transfer the pivotal connection for the plate 9 on to the upper pivot point of the vertical links 10 [R. 444, 445]. It is illogical to suggest that Novotney '403 is anticipatory of a concept which entails a complete sacrifice of the objects which it was the object of the Novotney '403 patent to secure. Defendant's contention is precisely like that of the infringer in *Topliff v. Topliff*, 145 U.S. 156, 12 S. Ct. 825, where it was rejected. There the court said:

"It is true that one of the models of the [prior art] patent put in evidence (Exhibit M) does, by its particular construction in shortening the links and strengthening and stiffening the entire structure, show an equalization of the pressure upon the springs, *but it is accomplished by sacrificing the swinging movement backward and forward, which it was the object of the [prior art] patent to secure.* The duplicate of the model from the Patent Office contains no suggestion of this kind, nor do the other models of the same patent, offered in evidence. While it is *possible* that the Stringfellow and Surles patent might, by a slight modification, be made to

perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; *but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose.* It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.” (Emphasis added.)

Topliff v. Topliff, *supra*, 12 S. Ct. at 827, 828.

While it was error for the trial court to say that platform inversion is mechanically possible in Novotney, the court nevertheless reached the right result in rejecting it as an anticipation, consistent with *Topliff*, notwithstanding defendant’s charge that the trial court was “confused” (A. O. B. 31). As a matter of law, the court was correct in stating in its opinion that “it does not appear in the instant case that the inverting of the platform in the Novotney patent can be said to in any degree be the essence of the invention contained therein” [R. 564].

The trouble with defendant’s reliance on *Huston v. Buckeye Bait Corp.*, 107 U.S.P.Q. 138 is that the principle stated therein cannot be applied to a fact situation such as was before the trial court in this case. Defendant does not even accurately extract from the *Hus-*

ton case the facts about which it talks in its brief at page 31. Actually, the patents involved dealt with fishing floats—the turning movement of a float and not, as stated by defendant, the turning movement of a sinker.

The facts in the *Huston* case, on the basis of which that trial court found a turning movement was inherent in a prior art device are these. The inherence was demonstrated *not* from the disclosure of the prior art Olson patent itself. Rather it was shown by

“*experiments* performed in the courtroom during the trial disclosed that the float which is the subject of the Olson patent, No. 1,463,020, (defendant’s Exhibit LL) as well as others have this same mode of operation as claimed for claim 9 of the patent in suit. The tests show that this turning movement is accelerated as the weight of the spring is increased. Other factors, *none of which are described in the first Huston patent* [in suit], enter into this turning operation.” 107 U.S.P.Q. at page 140 (Emphasis added).

Thus, in *Huston*, the court had before it courtroom experiments, apparently performed on Olson floats, demonstrating the turning movement, and others as well. Secondly, the patent in suit itself did not disclose other factors which entered into the turning operation. Clearly, neither of these factors is present in our case.

First, we have already seen why defendant would not dare to bring in an exemplar of Novotney ’403 and demonstrate it in court at the trial of this action.

On the second point, Lugash and only Lugash ever disclosed to the art a platform invertible over a paral-

lelogram linkage system and the factors entering into such inversion. As defendant was forced to admit to the court, Novotney '403 is absolutely silent on any such inversion [Tr. 483, 779].

In *Huston*, the trial court found the turning movement inherent in the prior art. 107 U.S.P.Q. 141. In our case, the trial court found inverting of the platform not inherent in Novotney '403 [Find. 17, R. 666]. The court closely distinguished between the actual disclosure of Novotney '403 and defendant's witnesses' testimony thereon when they examined Novotney '403 for Lugash's purposes, which purposes are nowhere disclosed in Novotney. It was because of defendant's testimony and not because of the disclosure of Novotney '403 that the court thought that any inversion could be mechanically possible in the Novotney device. The mechanical possibility, as we have shown, is factually wrong, but even if it were true, could not, as a matter of law, change the result here. *Topliff v. Topliff*, *supra*, 12 S. Ct. 827, 828. In the first place, there is absolutely no evidence that any platform inversion used before Lugash had brought about such result as that sought by him and in the second place, if it had done so under unusual conditions, accidental results, not intended and not appreciated, do not constitute anticipation. *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 43 S. Ct. 322, 329.

VII.

The Lugash Invention Was the First Practical Loader That Could Be Stored in an Out-of-the-Way Position Ever to Come Into Successful Use in the Trucking Industry, Having the Advantages of Previously Successful Commercial Loaders, but Without Their Disadvantages. Per se, This Is a Convincing Demonstration That the Differences Between the Prior Art and the Lugash Claims Are Beyond the Level of Ordinary Skill in This Art.

A & P Tea Co. v. Supermarket Corp., 340 U.S. 148, and *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545, are not apposite here. Indeed, the defendant's reliance upon these two cases points up the fallacy of the underlying premise of its case. Here, the Lugash loader is shown to embrace elements having an interdependent functional relationship for both loading and stowing purposes. It begs the question, and overlooks the holding of the Commissioner of Patents and the District Court, to state merely that parallel linkage systems and invertible platforms were individually known loader components. *United States v. Adams*, 86 S. Ct. 708. Defendant's experts admitted that the combination is novel. Lugash's is the *first* practical stowable loader [Find. 8, R. 664]. Accordingly, the controlling principle is that a new combination of elements, old in themselves, but which produce a new and useful result entitles the inventor to the protection of a patent. *Pursche v. Atlas Scraper & Engineering Co.* (C.A. 9. 1962), 300 F. 2d 467, 477.

Nor is the defendant's contention that the elements of the Lugash combination were mere substitutions of pre-existing loader designs supported by the prior art. If

that were so, it would follow that the resulting device—Lugash's—would have equivalent operating characteristics, but it does not. The court below found [Finds. 24, 26, 28, R. 668, 669] and the defendant's president admitted [Tr. 534-537] that the Lugash loader has shown valuable advantages over liftgate loaders, which were the only prior loading devices for trucks of any commercial significance [Find. 24, R. 668], while those from whom it is claimed to have been copied were discarded. Moreover, most of the loaders relied upon by the defendant were of a completely different type—they were lever-type loaders intended to tip over a load [Find. 22, R. 667, 668] and all of the prior art loaders relied on by defendant are characterized by total absence of functional relationship of the parts when not in use for loading. For these reasons, there cannot be any equivalency. *United States v. Adams, supra.*

In large parts, the foregoing is a paraphrase of pertinent language in the opinion in *United States v. Adams*, which is of controlling effect here. This also demonstrates two basic fallacies of defendant's position.

First, the error of defendant's attempt to treat Lugash as if the mere inversion of a platform were the single novel feature. Lugash's invention is the combination and not any one of its elements, all the elements of the combination being functionally interrelated for both loading and stowing purposes. Again paraphrasing *Adams*, "it is evident that (plaintiff's) present reliance upon this feature was not the after-thought of an astute patent trial lawyer". "The findings, approved and adopted by the (District Court), also fully support this conclusion".

Second, there is the fallacy of defendant's attempting to treat Lugash's claims as a mere aggregation. Where the District Court found that all of the elements of the Lugash combination are functionally related for both loading and stowing purposes [Find. 8, R. 664], defendant makes no attempt to demonstrate lack of support for these findings—instead defendant resorted to ridicule. Again paraphrasing *Adams*, "Here, however, the (Lugash loader) is shown to embrace elements having an interdependent functional relationship. It begs the question, and overlooks the holding of the Commissioner and the (District Court) to state merely that (parallel linkage systems and invertible platforms) were individually known (loader) components".

Defendant alleges that the findings do "not state a single reason why the combinations" of prior art patents relied on by defendant do not make Lugash's combination obvious (A. O. B. 17). As a try at shifting the burden of proof to plaintiffs, we ignore this. The fact is that Findings 6-8, 10, 11 and 15-23 clearly state what the prior art was, what Lugash did to improve upon it, and the total absence in the prior art of any suggestion of Lugash's combination, functions and results.

Then, defendant says that the findings "are *all* directed to" sub-tests of commercial success, etc. (A. O. B. 17). Obviously, this charge of defendant cannot be squared with the presence of Findings 6-8, 10, 11 and 15-23.

Next, defendant charges that its witnesses' testimony on obviousness was uncontradicted and was ignored by the trial court (A. O. B. 39-41). The fact is, that plaintiffs expert testified that *all* of defendants 27 prior

art patents are silent on Lugash's combination, the functions of its elements and results [Tr. 879, 880] and defense counsel never cross-examined him on the point. The court recognized it was dealing with conflicting expert testimony on obviousness. The court said, "The experts are helpful in these things, I can tell you, but they naturally are opposed when it gets down to what is obvious" [Tr. 903, lines 3-5]. Plaintiffs' cross-examination of both of defendant's experts regarding, *one*, the scope and content of the prior art; *two*, the differences between the prior art and the claims at issue, and *three*, the level of ordinary skill in the pertinent art are the subject of hundreds of pages of transcript [Tr. 493-617, 761-826]. These three basic factual inquiries are "necessary to a determination of Section 103—obviousness". *Walker v. General Motors Corp.*, F. 2d, 149 U.S.P.Q. at 474 (C.A. 9, 1966). Surely, defendant will not deny that it was the function of the trial court to make the ultimate finding of non-obviousness, no matter what either side's expert said on the ultimate question. Really, defendant's complaint is that its experts' testimony did not produce conviction in the trial court's mind. "Such a complaint from the losing side of the lawsuit is as old as the acceptance of expert testimony itself". *Continental Connector Corp. v. Houston-Fearless Corp.*, *supra*.

Defendant contends it is obvious to combine two references in a way which defeats the objects of each of the two reference patents. Defendant contends that where

there are two patents, neither of which has the slightest suggestion of combining the features of the two, a person of ordinary skill in the art would make such combination. The law is otherwise. *Temco Co. v. Apco*, 275 U.S. 319, 327, 48 S. Ct. 170, 172, 173; *Hobbs v. Beach*, 180 U.S. 383; *Application of Bergel* (C.C.P.A. 1961), 292 F. 2d 955, 956. Furthermore, there is no possible combination of references which could be made in this case which could achieve Lugash's combination of elements functioning in the same way to achieve the same result.

Consider defendant's proposed combination of Novotney '403 and Narvestad, Peters or Jester. Clearly, the suggestion for such combination cannot arise out of Novotney '403 because, as we have already pointed out, that would entail sacrificing the tailgate function which it was the object of the Novotney '403 patent to secure. Equally clear is the fact that the suggestion of inverting a platform over a parallelogram linkage system cannot possibly rise out of Narvestad *et al.* as that would sacrifice the load tipping action which it was the object of the Narvestad *et al.* patents to secure [Find. 22, R. 667, 668]. As there is no suggestion in either patent of making the proposed combination, they cannot render the Lugash combination obvious. *Temco v. Apco, supra*. And so we see the accuracy of the trial court's Finding of Fact that "the prior art patents relied on by defendant, taken alone or in any combination, do not provide any teaching or disclosure that can be considered to ren-

der the combination claimed in the Lugash '227 patent obvious or apparent to those skilled in the art" [Find. 18, R. 666, 667].

The combinations of prior art argued by defendant cannot work because they would never achieve Lugash's combination of an invertible platform pivotally connected to the parallel linkage system and without interfering structure that either

1. Prevents raising the inverted platform to stowed away position (Novotney '403, Wood '135)
2. Places the hinge away from, not on, the lifting arms (Narvestad, Novotney '403), or
3. Prevents inversion of the platform without disassembly of the lifting arms (Jester) or of the platform (Peters).

In these combinations of prior art, if one eliminates the interfering structure (*e.g.*, Novotney '403 yokes 8; Narvestad posts 24) to try to make the platform hinged to the arms and/or to invert the platform, the prior patentees' original objectives are totally defeated *and* the device is rendered useless for loading.

Temco v. Apco is very much in point. There, as here, there was involved the contention of an infringer that "it may be *possible* to show how, by *turning over on its back* the specified device, the torsional spring could be made partly and ineffectively to perform this function, but as described in this or other cited patents, there *is no suggestion or recommendation of the arrangement in Thompson's*". 275 U.S. at page 327, 48 S. Ct. at pages 172, 173 (emphasis added). That patent in suit was upheld—as should be the Lugash patent here for the first successful loader of its kind.

Now, as the trial court said in its opinion, “nor does [Novotney ’403] or any other prior art patent do substantially the same work in substantially the same manner” as Lugash [R. 563, lines 7-9]. And in discussing the defendant’s proposed combinations of prior art, the court concluded “the fact that the old elements had been combined in some examples of prior art does not render the invention of Lugash ’227 obvious, since ’227 produced novel and inventive features over the prior art” [R. 567, lines 6-11]. The point is that the fact issues regarding various combinations of prior art, which defendant now proposes to try in this court, have already been tried and found wanting. After trial, the court saw and found that no possible prior combination of prior art will work to reach the results of Lugash ’227.

“This is a result that no other prior invention had ever reached. The fact that the Swift combination *worked* and gave an accurate depth measurement, while none of the prior devices had, is an indication of inventiveness. *Twentier’s Research, Inc. v. Hollister, Inc.*, 9th Cir., 319 F.2d 898, 138 U.S.P.Q. 473.” (Emphasis added).

McCullough Tool Co. v. Well Surveys, Inc., 343 F. 2d 381 at page 393 (C.A. 10, 1965).

That is the situation here. No prior device ever worked for and achieved Lugash’s results. “*It works*. None of the prior devices did. . . . This result is sufficiently ‘new’, ‘unusual’ and ‘surprising to indicate inventiveness [i.e., non-obviousness]’”. (Emphasis by Court).

Twentier’s Research, Inc. v. Hollister, Inc., 319 F. 2d 898, 902 (C.A. 9, 1963).

Lugash has “—something which is the law of its organization and function, and raises it above mere aggregation of elements to a patentable combination”. *Diamond Rubber Co. v. Consolidated Tire Co.*, *supra*, 220 U.S. at 442.

Defendant has unconsciously put itself in a dilemma. Is it not anomalous that defendant argues various combinations of prior art would be obvious when, also according to defendant, the Lugash combination means taking a backward step in the art? What defendant's position really demonstrates is that Lugash was beyond the grasp of the ordinary skill of the art at the time the invention was made. Defendant's backward step argument rather convincingly demonstrates that any worker of ordinary skill would be deterred from any investigation into such a combination as is used by Lugash. All prior art stowable loaders were of a type to tip over loads, used relatively small platforms, could not be put into and out of use except by disassembly, assembly, or manual manipulation of parts or the parts supporting the platform [Find. 20, R. 667]. We say that these known disadvantages of old devices would naturally discourage the search for Lugash's invention by any worker of ordinary skill in the art, and they mean non-obviousness of the Lugash invention. *United States v. Adams*, *supra*, 86 S. Ct. at page 714.

On this record, it is indisputable that, prior to Lugash's conception, nobody in this art made the combination of invertible platforms and parallelogram linkage systems, to use our shorthand expression. Defendant's two experts, both patent-wise men of skill in this art, never testified that they actually conceived of the combination prior to Lugash. As the Court found, none

of the prior art relied on by the defendant, taken alone or in any combination, provided *any* suggestion of the combination [Find. 18, R. 667]. Thus, the *only* evidence in this record is the biased testimony of defendant's experts that if, prior to Lugash's invention, *they* had had the prior art before them, then it would have been obvious to *them* to make Lugash's invention or conception. That clearly does not rise to the level of satisfactory proof of obviousness. Such hypothesis, based on the biased testimony of patent-wise experts of long familiarity with the art, is "inexplicable". *Loom Company v. Higgins*, 105 U.S. 580, 595. And if the Lugash conception had actually entered the minds of these experts prior to Lugash's conception, "would it not be a creative thought whose presence would convert the mechanic into an inventor". *Hobbs v. Beach*, 180 U.S. 383, at 393.

In brief, defendant is asking this court to invalidate a valuable patent right merely on the basis of the biased inferences of defendant's witnesses, and in the face of a record where every material issue of fact regarding scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the art were thoroughly tested and found contrary to defendant's position. It should not require citation of any authority to point out that an important patent giving the art its first practical stowable loader, should not be invalidated on any such tenuous basis.

VIII.

Defendant Did Not Copy the Prior Art. It Deliberately Rejected the Prior Art and Utilized Lugash's Combination.

As Lugash's claims are to a combination of functionally related elements, it does defendant no good to say that since platform inversion is an old feature, "defendant cannot infringe by using what is in the public domain". (A. O. B. 45). This argument is irrelevant.

"Of course, an element is a part, an essential part, of the combination, and enters as an operative agent in the performance of its functions. But this does not make it identical with the combination. It may be novel, patentable of itself, subject to its own special monopoly, or it may be free for everybody's use; but, *whether free or not free, free when the combination was formed (invented) or become free, it is not identical with the combination.*" (Emphasis added).

Leeds and Catlin Co. v. Victor Talking Machine Co., 29 S. Ct. at page 501.

Now defendant attempts to characterize itself as one who independently of any knowledge of the plaintiffs' patents, pieced together the elements of the infringing Folda-Lift device. This is flatly opposed to all the evidence in the case, defendant's own admission, and the court's findings [Tr. 520, 574-580, Finds. 12, 18, R. 665, 667, lines 5-6].

The case is not as characterized by defendant. Instead, it is the case of an infringer who has done this piecing together only after he has seen the patentee's invention and rejected the prior art [Tr. 511-534]. This

in itself is strong evidence of "invention" i.e., non-obviousness. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U.S. 428, 31 S. Ct. 444; *L. Ford Cartons v. Gordon Cartons, Inc.*, 121 F. Supp. 363, 368, 369 (D.C. Md. 1954); *Stevenson v. Lamson Corporation* (D.C. N.D. Cal. 1962), 210 F. Supp. 917.

The doctrine of equivalents operates in favor of the patentee of an invention consisting of a combination of old ingredients which produce new and useful results. *Graver Tank & Manufacturing Co. v. Linde Air Products*, 339 U.S. 605, 70 S. Ct. 854, 856. The Lugash Tuk-A-Way loader is of such novelty and importance as to constitute a distinct step in the progress of the art and it went into immediate and extensive use. "Its claims are therefore entitled to a fairly liberal construction". *Letson v. Alaska Packers Association* (C.A. 9, 1904), 120 F.R. 129, at page 140. But even without such liberal construction, it is well settled that immaterial variations between a patent and an accused device do not avoid infringement and that is the case here. *Cobbs v. Wisconsin Power & Light Co.*, 250 F. 2d 100, 109 (C.A. 7, 1957); *Georgia Pacific Corp. v. United States Plywood Corp.*, 258 F. 2d 124, 139 (C.A. 2, 1958).

In the first place, Lugash's claims are not limited as regards the precise location of the lifting linkages with respect to the platform. The presence of the phrase "adjacent each side of said platform" in claim 8, for example, is not limited to linkage systems precisely inside or on or outside of the extreme opposite ends of the platform. Such arrangements are equivalents in the art, as shown by defendant's failure to make any such discrimination when arguing prior patents. Viewed differ-

ently, the addition of sideward extensions of the platform without in any way altering the function and result of the parts of the mechanism clearly cannot avoid infringement. *Neff v. Cohu*, 298 F. 2d 82.

Inverting the platform to "superposed position on said linkage system" is all that is required by claim 8. The contact between the Folda-Lift platform and the cylinder casing is at the same location relative to the linkage systems as in the patented device, to achieve the same result as in *Lugash*, *i.e.*, to permit the inverted platform to be carried by the linkage systems and power means to the raised stowed away position under the truck bed without in any way interfering with the function of any of the parts. Defendant's position here is like the rejected contention of the infringer in *Bianchi v. Barili* (C.A. 9, 1948), 168 F. 2d 793, at page 799.

Defendant's arrangement risks damage to the power cylinder when the platform is dropped onto it in the process of inversion. But this risky disguise does not aid defendant. One does not avoid infringement by following the teachings of a patent imperfectly or by constructing a device that does not function as well as the patented structure. ". . . Defendants therefore cannot escape infringement by adding to or taking from the patented device by changing its form, or even by making it somewhat more or less efficient, while they retain its principle and mode of operation and attain its results by the use of the same or equivalent mechanical means". *Angelus Sanitary Can Machinery Co. v. Wilson* (C.A. 9, 1925), 7 F. 2d 314, at page 318. *Lugash* claim 1, calls for a stop means against which the platform may be swung to overlie the linkage systems. The defendant uses the power cylinder as such stop means.

But, one does not escape infringement by providing a single element which fully responds to a plurality of elements in the patent". *Hydraulic Press Manufacture Co. v. Williams, White & Co.*, 165 F. 2d 489, at page 492 (C.A. 7, 1947).

Defendant claims that in some models of its Folda-Lift loader "the ramping gate links do not produce the so-called 'level ride' platform". (A. O. B. 50). The testimony of defendant's president destroys this line of argument. He admitted that both ramping and non-ramping linkages are parallelogram linkages. [Tr. 611, line 5; 612, line 6] and that the function of these linkages is to keep the platform level so loads would not be tipped over [Tr. 553, lines 1-8]. What defense counsel is trying to do is to make a 3/16 inch difference [Ex. 8, pp. 81-83] into a non-equivalence in the face of admissions of equivalency.

Finally, we get to the contention that the difference between defendant's prior conventional tailgate loader and its infringing Folda-Lift is a mere matter of degree. (A. O. B. 46-47). Here, defendant would have us believe that defendant's Folda-Lift, which is a combination of functionally related elements, all of which are active for both loading and stowing purposes, is different merely in degree from its prior tailgate loader, in which such functions and results of the parts are *impossible*, as admitted by defendant's president. Thus, in the infringing Folda-Lift device, when the arms are lowered, the platform can be inverted to superposed position over the linkage systems. By contrast, when the tailgate platform of the defendant's prior E.B. tailgate loader is in lowered position, it is *impossible* to lift or pivot the platform through *any* degree of movement

[Tr. 595, line 16; 596, line 19]. Defendant had to provide a different platform, had to provide a different body spacer, and had to provide a different location of hydraulic lines and fittings [Tr. 602, line 12; 604, line 14], the net result of which is to absolutely prevent co-action of the parts to serve as a tailgate and to allow the parts to serve as a Tuk-A-Way loader, a function which the parts never had before.

A tailgate loader, and a Tuk-A-Way loader are mutually exclusive concepts involving different arrangements of parts. This was abundantly clear to the trial court as a result of demonstration of prior tailgate loaders, commercial exemplars of the plaintiffs' loaders, and a model of the defendant's infringing loader [Tr. 852, *et seq.*]. Defendant gives no credit to the opportunity of the trial court to appraise this evidence and the expertise of the testimonies thereon. To defendant's counsel, mutually exclusive devices are mere differences in degree rather than kind.

IX.

Penalties for Patent Mismarking Cannot Be Imposed on the Mere Basis of a Presumption.

Plaintiffs' manufacture and sell a large number of different models of the patented Tuk-A-Way loader [Tr. 303, line 19-304, line 10], which are constructed and operate in accordance with the teachings of Lugash '227 [Find. 9, R. 664, 665]. After the issuance of the second Lugash patent '196, certain models of the Tuk-A-Way loaders carried both patent numbers, although they were not of a unitary construction as required by the claims of the second patent. These are the H-23 model and a power take-off model, the latter model constituting less than 1% of the plaintiff's busi-

ness [Find. 37, R. 672]. Regarding the H-23, defense counsel summarized the evidence as follows:

“There was nothing to show whether there were a lot of sales or no sales as to that.” [Tr. 931, lines 14, 15].

Thus, the great majority or almost all of the plaintiffs’ sales were of Tuk-A-Way loaders properly displaying the numbers of both Lugash patents.

The court found that the mismarking of the two models of plaintiffs’ loaders was an innocent mistake [Find. 38, R. 673]. Defendant argues that “no evidence was presented by plaintiffs attempting to show that the mismarking was innocent”. (A. O. B. 52). Defendant’s contention can only be accepted by ignoring the bare recital of facts stated above regarding the relative volume of sales of mismarked and correctly marked loaders. Additionally, defendant gives no weight to the fact that the court itself questioned the plaintiffs’ witness, Murray Lugash, relative to the issue and circumstances surrounding the placing of both patent numbers on the certain models of the plaintiffs’ devices. He was the person who arranged for the making of the tags with both patent numbers of them [Tr. 306, line 16; Tr. 307, line 11]. As he testified, these patent numbers were used on Tuk-A-Way loaders upon advice of counsel and with the intent of publicizing their patent numbers [Tr. 307, lines 5-10, 319, lines 10-18]. Plainly, defendant is attempting to deny the right of the trial court to make reasonable inferences from the sum of the evidence before it and, more importantly, the inferences to be drawn from the demeanor of the witness before the court.

Now the statute, 35 U.S.C. 292, prohibits the false marking of “an unpatented article”. Here, all articles

were properly marked with the first Lugash patent number. In practical effect, what we have here is a situation in which a minimal number of the total sales of plaintiffs bear both patent numbers, as a result of innocent mistake. Now, the common practice of marking a patented article with the words "Manufactured under one or more of the following patents . . ." in a situation where not all of the listed patent numbers are applicable to the article so marked, is not a misuse of the patent numbers. *Sperry Products, Inc. v. Aluminum Co. of America* (D.C. Ohio, 1959), 171 F. Supp. 901, Aff'd. 285 F. 2d 911, at page 927.

Plaintiffs' position is that, without more, a mistake in patent marking constitutes violation of the statute. However, this ignores the specific language of the statute that this must be "for the purpose of deceiving the public". Obviously, to prevail defendant must establish more than mere mismarking. It must also present evidence of a purpose to deceive the public and the record is totally lacking in any such evidence. The presumption of *Krieger v. Colby*, 106 F. Supp. 124, relied on by defendant, cannot here take the place of evidence which would reasonably support a conclusion of deceit, for such result would have the effect of reading out the statutory requirement of a showing of a "purpose of deceiving the public". On the whole evidence, the presumption of *Krieger v. Colby* evaporates in the circumstances of this case. The evidence showed minimal sales of mismarked articles, the mismarking occurring as a result of mistake. That this is an accurate appraisal of the circumstances before the court is plain from the two pages of its opinion devoted to this subject [R. 571, line 2-573, line 2].

Conclusion.

As is conceded by defendant, the matters involved here require, and in the trial court they received, expert clarification. Further, the whole record is fairly formidable in quantity. This body of proof, presenting material and disputed questions of fact, has no other elucidation in defendant's brief than the arguments of counsel, which arguments, as we have shown, have no factual basis on the evidence as a whole. This is the posture of defendant and the basis on which it asks this court to reverse the trial court. It should not be done. *Leeds and Catlin Co. v. Victor Talking Machine Co.*, 29 S. Ct. 495, 497.

A thorough examination of the whole record will produce a satisfying conviction that the trial court was correct in its judgment. This conviction should be reinforced as many important elements of plaintiffs' case were made out by cross-examination of defendant's witnesses, drawing out admissions which directly impeach many of the assertions made by defense counsel in its opening brief.

There was the claim of "irrefutable" anticipation where both defendant's experts admitted that there was none. There was the claim of the dropleaf tailgate going "beneath" the bed of the truck, based on exhibits admitted not to be prior art, and on a record where it was made clear from defendant's witnesses that the platform could not go "beneath" the bed of the truck. There was the claim that the Lugash invention is "useless", when in fact, the defendant sold over half a million dollars worth of said useless loaders and is still selling them, subject to a supersedeas bond. We submit, plain-

tiffs' case is a strong case. *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 43 S. Ct. 322, 324.

Lugash has given this art its first practical stowable power loader. Lugash's Tuk-A-Way loader has been shown to possess very important advantages over *all* previously available devices. Defendant's patentwise president was forced to admit the importance of these advantages over all previous commercially available loaders, including the dropleaf tailgate.

Lugash's loader is a combination of functionally related elements operating both for loading and stowing purposes. While defendant's counsel ridicules the functions of the elements for stowing purposes, saying it is all useless, there remains the undisputed fact of defendant's "conversion" of its tailgate loaders to manufacture the infringing Folda-Lift, incorporating Lugash's combination of elements functionally related for loading purposes and now also functionally related for stowing purposes and with the consequence of rendering the resulting infringing device useless as a tailgate. There can be no better demonstration of the great practical utility of Lugash's patent and of its non-obviousness to a prior art that was obsessed with tailgates. *Grant Tire Co. v. Consolidated Rubber Tire Co.*, *supra*.

We respectfully submit that the trial court's judgment in this case, arrived at after a lengthy trial and a careful basic factual inquiry into the facts on which the case turns, should be affirmed.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK E. MUELLER

No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MFG. CORP., a California corporation,

Appellant

vs.

MAX J. LUGASH and MAXON INDUSTRIES, INC., a California corporation,

Appellees-Cross Appellants,

vs.

SANTA ANITA MFG. CORP., a California corporation,

Cross Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Defendant (appellant) has not and does not assert that the district court erred in every finding as represented by plaintiffs (Ans. Br. of App., p. 1). The district court actually made basic findings of fact favorable to defendant which compel a holding of invalidity for Lugash '227 as a matter of law. It was and is defendant's position that that structure defined in the Lugash '227 apparatus claims is fully found in the old (1940) loader of Novotney '403 including the only alleged new element in the claims, *i.e.* "hinge means permitting inversion of the platform". Also, that the prior Narvestad, Peters and Jester patents specifically solve the same dock load-

ing problem faced by Lugash in the identical manner by folding the loading platform about hinge means and storing it up under the truck bed in an out-of-the-way position.

The district court **agreed** with defendant in finding that the Novotney '403 loader platform **can be inverted** over the lifting arms [Find. 16, Vol. I-B, p. 666]. It correctly found that each of the Narvestad, Peters and Jester patents disclose the folding or inverting of a platform by its hinge means over the lifting arms into an inverted out-of-the-way position [Find. 19, Vol. I-B, p. 667]. It is therefore principally the trial court's error in applying the law and its interpretation of the legal effect of basic fact findings that are carefully specified by defendant in its Appellant's Opening Brief (pp. 10-15).

Each of defendant's specification of error paragraphs states a single error in the topical sentence with further particularities of the error set out thereafter. Plaintiffs' bitter attack upon defendant's brief (Ans. Br. of App. pp. 2-3) is wholly unwarranted. Defendant's entire brief is shorter than the objectionable fifty-six page statement of the case in *Thys Co. v. Anglo-California National Bank*, 219 F. 2d 131, 132 (C.A. 9, 1955), referred to by plaintiffs. Certainly this court does not want uninformative ultimate conclusions or mere disgruntled objections (as in the Op. Br. of Cross Appellants, pp. 10, 11):

"Assignment 3 is: 'That the evidence was and is insufficient to justify or support the verdict of the jury and/or the judgment.' This is not a proper or sufficient assignment of error * * *"

Mutual Life Insurance Co. v. Wells Fargo Bank & Union Trust Co., 86 F. 2d 585 (C.A. 5, 1936).

THE LUGASH '227 COMBINATION IS FOUND IN NOVOTNEY '403.

In their anxiety to rebut the devastating effect of the anticipatory prior art Novotney patent, plaintiffs have completely misrepresented and falsified in every statement made thereon in their brief with the single exception of argumentatively admitting that the trial court found that the platform 9 of Novotney could be folded back over the lifting arms, as shown in defendant's Exhibits AM-1 and 2 (Ans. Br. of App. pp. 7-9, pp. 39-44).

The first outright misrepresentation of Novotney '403 by plaintiffs is on the trial testimony of Mr. Gabriel, stating that he "admitted" that no prior art patent shows the combination of parallel linkage systems and invertible platform. Plaintiffs repeat this falsity through their brief (Ans. Br. of App., pp. 3-4, 7; 39). pointing to pages 786-787 of the transcript. Plaintiffs deliberately conceal the fact that the entire line of questioning referred to and the answers given were "**apart from Novotney**" (Vol. III, p. 784).

"Apart from Novotney, which we have covered, '403, is there any prior patent in Exhibit C or Exhibit D which shows a platform which is inverted over a parallel rule linkage system?"

"A. No, there is no patent in these two books *other than Novotney* that would show a platform over a parallel rule linkage system per se.

Q. All right. A. There are three that we have pointed out; Peters, Jester and Narvestad, which show a platform inverted over a linkage system, which would be the equivalent of a parallel

rule system in this art, and there are platforms that swing under and . . .” (Vol. III, pp. 784-785, Emphasis added).

There is no admission as improperly asserted by plaintiffs. Novotney '403 discloses the Lugash '227 combination exactly. The overwhelming weight of Mr. Gabriel's testimony on the anticipatory effect of Novotney '403 (Vol. I-A, pp. 268-275; Vol. III, pp. 703-714) was never refuted by plaintiffs.

DEFENDANT'S EXHIBITS AM-1 AND 2 CORRECTLY ILLUSTRATE THE FOLDING OF THE NOVOTNEY '403 PLATFORM FOUND BY THE TRIAL COURT.

Plaintiffs are forced to attack the Exhibits AM-1 and 2 indirectly on fabricated issues because they have not and can not answer the compelling logic of the exhibits and Mr. Gabriel's testimony on the merits. The first figure under the heading Novotney on each of Exhibits AM-1 and 2 is Figure 1 of the Novotney patent with irrelevant part numbers removed and relevant parts colored for clarity. The second figure under the Novotney heading is a representation of the Novotney structure illustrating Mr. Gabriel's testimony that the platform can be folded over the lifting arms to obtain the identical result of Lugash '227. It was clearly presented to and **accepted** by the trial court as such, the court stating:

“THE COURT: He was merely trying to demonstrate how it could be folded over.” (Vol. III, p. 751).

“THE COURT: As far as I am concerned **they are illustrative of the fact that this platform can fold over.**” (Vol. III, p. 752).

**PLAINTIFFS FAILED TO SHOW THAT THE
NOVOTNEY PLATFORM CANNOT BE
FOLDED BECAUSE OF STRUCTURAL
DIMENSIONS.**

It was obvious to both Messrs. Vogel and Gabriel that the Novotney platform 9 can be folded “clear over” without modification (Vogel, Vol. III, pp. 699-700, 777-778). Plaintiffs offered no direct testimony by Mr. Comstock on Novotney at the trial (Vol. III, pp. 867-881) beyond the pre-trial mere general denial of folding in Novotney (Vol. I-A, p. 206). At trial, under cross-examination, Mr. Comstock argued that *if* the platform lugs mounting the platform 9 to the yoke member 8 had a certain contour and *if* the platform 9 were “substantially longer than it is shown here” (Vol. III, p. 894), it could not be folded over the lifting arms. The trial court rejected Mr. Comstock’s conjecture on what would happen *if* certain modifications were made in the patent disclosure.

Plaintiffs’ argument that the Novotney platform can not be folded because it would hit the truck bed D (Ans. Br. of App., pp. 45-50) was also lost at the trial. Mr. Comstock asserted that if the Novotney ’403 platform was to fold up, it could be no more than “possibly 24 inches, which I think is still smaller than would be practical” (Vol. III, p. 896) and that 30 inches would be standard (Vol. III, p. 897). But Mr. Comstock was confusing the platform length with the lifting arm length of 30 inches. **He admitted his confusion and changed his answer to state that a 22 inch platform was the average** (Vol. III, pp. 897-898). Thus, according to plaintiffs’ own expert, an *average* platform of 22 inches could be

easily folded up in the Novotney loader, there being a full 24 inches of platform clearance.

After having rested their case, plaintiffs realized their failure to show that the Novotney platform would not fold up under the truck bed as convincingly shown by defendant's witnesses and exhibits. They therefore connected a false argument on an exhibit attached to their trial brief which was prepared *after* trial, which is not part of the evidence and was never subject to cross-examination. It is not evidence and cannot be considered as such. Plaintiffs have devoted almost an entire page of their brief (Ans. Br. of App. p. 42) arguing that red dotted lines placed on the exhibit extrajudicially by plaintiffs' counsel evidence plaintiffs' post trial contention that the Novotney '403 platform can not fold. Plaintiffs' false exhibit and over reaching argument thereon should be completely disregarded by this court. The trial court correctly found that the platform 9 can be folded, as illustrated in Exhibits AM-1 and 2. Your Honors can easily see how each and every feature, structure and result of Lugash '227 is found in Novotney '403 by reading the claim language set out therein on the similarly colored parts in both Lugash '227 and Novotney '403 illustrations in these Exhibits AM-1 and 2.

Powered Raising of the Inverted Novotney '403 Platform Is Conceded.

Plaintiffs do not argue that the power means of Novotney can not be used to raise the parallelogram lifting arms with the platform inverted thereon. They only contend that such powered raising would not be "fully" up under the truck bed (Ans. Br. of App., pp. 8, 45-48). The **functions** of a **power means**

and of a **parallelogram linkage** system as active elements in both “stowing and loading operations” (Ans. Br. of App. pp. 5-7) are thus **conceded** after the Novotney '403 platform is inverted (a suggestion clearly taught by each of Narvestad, Peters and Jester).

Plaintiffs' only argument against full raising of the inverted platform by the power means is based upon the contention that the inverted platform, in hitting up under the truck bed, would prevent the yokes 8 of Novotney from entering “under the bed of the truck” (Ans. Br. of App. p. 45). Apart from the fact that the Novotney '403 platform would have by then been stored out-of-the-way, obtaining the Lugash '227 result, the yoke or platform support member 50 of Lugash '227 does not enter up under the truck bed either. As seen in Fig. 1 of Exhibit 1 (or p. 1, Appx. C, App. Op. Br.) the Lugash yoke number 50 is placed outside the rear end of the truck bed B' under an unclaimed flange element, flange 61'.

The unclaimed body spacer or flange 61' protects the portion of the '227 loader extending out rearwardly of the truck bed from heavy fork lift trucks which would otherwise have to ride thereon during dock loading (Vol. III, pp. 316-317). It is this flange 61' which prevents the '227 platform from being raised into a tailgate position when the loader is elevated.

No modification of Novotney need be made to raise the platform up under the truck bed until it hits the underside thereof in a stored position. If any portion of the loader, such as yokes 8, protrude outwardly of the truck bed, a simple unclaimed and obvious flange 61' could be used. It would be unnecessary however

in view of the common practice of using dock plates or ramps to bridge the gap between the open end of the truck body and the dock as demonstrated by plaintiffs during the trial with the plaintiffs' Tuk-A-Way loaders (Vol. III, p. 856).

THE OLD NOVOTNEY '403 LOADER STRUCTURE CAN NOT BE REPATENTED BECAUSE OF A SUPPOSED NEW METHOD OF OPERATING THE OLD STRUCTURE.

The trial court refused to hold Lugash '227 invalid over Novotney '403 because it did not believe the folding of the platform was "necessary as a part of the manipulation" of the Novotney loader (Vol. III, p. 948). The plaintiffs' cases supposedly supporting such a requirement in a prior art device (Ans. Br. of App. p. 43) actually only deal with the definition of "inherency" required to support a claim before the patent office when rejected on the applicant's own insufficient disclosure. This is not the test for patentability over the prior art disclosure of *another*.

Plaintiffs did not distinguish the holding in *Huston v. Buckeye Bait Corp.*, 107 U.S.P.Q. 138 arguing the construction of the device (it was actually a combination of a weight and sinker acting on opposite sides of a cork) and pointing out that tests were conducted by expert witnesses before that court. Such test, unnecessary in this case, could not in fact have been conducted on the old (1940) Novotney '403 loader which was not *now* commercially available and which was *not* one of the Novotney loaders which defendant's president had seen (Vogel, Vol. III, p. 60). But, as plaintiffs now admit on this appeal, the **district**

court below accepted defendant's experts testimony on Novotney '403 in finding it would fold. But must it have been a necessary manipulation in Novotney to anticipate?

The actual manipulation of a prior device in the same manner may be necessary to anticipate a **method** or **process** claim. But plaintiffs' patent attempts to monopolize a *structure*. The '227 claims do not require that the platform be folded, but only that it be pivoted on hinge means permitting inversion. As readily seen from defendant's Exhibits AM-1 and 2, the Lugash '227 claims actually define only the old *structure* of Novotney with hinge means *permitting* inversion of the platform.

"An old mechanism fully capable of a use not then observed, anticipates a later patent for the application of that means to the new use".

Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73, 89 (6th Cir., 1943).

The applicability of the *Mathews* case (and the following line of cases relied upon by defendant in its App. Op. Br. pp. 32 and 33) was not refuted by plaintiffs.

Similarly:

"The trial judge found that the claimed 'resharpening' would occur equally with the Jeffrey 1909 machine if it were reversed frequently, in accordance with Battey's teachings. Thus, even if we assume that the so-called 'resharpening' effect was **unknown** in the prior art and that its discovery by Battey rises to the dignity of in-

vention, nevertheless **Battey's only discovery was a new manner of using an old machine.** Such a discovery is clearly not patentable. *Mathews Conveyor Co. v. Palmer-Bee Co.*, 6 Cir., 1943, 135 F.2d 73, 89." (Emphasis added)

Pennsylvania Crusher Co. v. Bethlehem Steel Co.,
193 F. 2d 445, 449-450 (3rd Cir., 1951).

Lugash '227 is at best merely such a discovery of a "new manner of using an old machine." Furthermore, **the folding concept of Lugash '227 was not "unknown"** in the art but is admittedly suggested by each of the prior art Narvestad, Peters and Jester patents [Find. 19, Vol. I-B, p. 667].

**THERE ARE NO DIFFERENCES BETWEEN
LUGASH '227 AND THE COMBINED
STATE OF THE ART.**

Plaintiffs do not attempt to answer defendant's contention that the Findings fail to advise this court of any differences between Lugash '227 and the combined state of the art, such as Narvestad and Novotney, but chose to **"ignore this"** (Ans. Br. of App., p. 53). Neither do plaintiffs advise this court of any place in the trial record where any such differences were testified to. They only argue that defendant's witnesses were extensively cross-examined and that their witness testified to the contrary (Ans. Br. of App. pp. 3, 53-59). The record is to the contrary. For example, defendant's president, Mr. Vogel, testified on direct that the Narvestad patent would have made

it obvious to him in 1956 how defendant's prior art parallel arm hydraulic loaders could be modified to place the platform in an out-of-the-way position (Vogel, Vol. III, p. 462) and about the similarities between the prior art Novotney '403 hydraulically powered loader and defendant's own prior hydraulically powered loaders (Vogel, Vol. III, p. 480). A careful review of the cross-examination of Mr. Vogel (Vol. III, pp. 493-617) shows that plaintiffs' counsel never cross-examined Mr. Vogel on the Narvestad patent or its teachings as applied to Novotney or defendant's own prior art hydraulic loaders.

On cross-examination (Vol. III, pp. 761-838, 847-851), Mr. Gabriel was never questioned on his combination of the teachings of Novotney and Narvestad, Peters or Jester.

The only time that plaintiffs' counsel questioned plaintiffs' expert, Mr. Comstock, on the question of obviousness of more than one reference taken together was at page 870 of the trial transcript. There, Mr. Comstock only said that Lugash '227 was not obvious in view of the combination of Narvestad and Peters. But, Mr. Comstock distinguished *both* Narvestad and Peters, in his view, on the basis that neither had a parallelogram linkage (Comstock, Vol. III, pp. 868-870). **Why didn't plaintiffs' counsel ask Mr. Comstock whether Lugash '227 would be obvious in view of the parallel arm loader of Novotney '403 in view of either Narvestad and Peters?**

The combination of Narvestad and Novotney '403 is opposed on plaintiffs' false argument that the Novotney tailgate function would be lost if the platform were folded as suggested by Narvestad (Ans. Br. of App., p. 55). But, who testified that Novotney '403 would lose its tailgate function? It is plaintiffs' unclaimed flange 61' [Ex. 1] that prevents the Lugash '227 platform from acting as a tailgate. No such modification is necessary in Novotney, whose tailgate would continue to serve as a tailgate when desired. Plaintiffs also contend that all trucks now have a separate tailgate as original equipment (Ans. Br. of App., p. 13) so that **on their argument**, the loss of such function is not important.

Plaintiffs' arguments are presented apart from any trial testimony and are only **counsel's** own interpretation of the references. Plaintiffs' argument ignores (and thus admits) the obviousness of such combinations evidenced from the trial testimony of the **experts** and the **patent office** action of combining Narvestad with a hydraulically powered, parallel arm loader (Wood '135) in acting on the second Lugash patent [Ex. B, p. 17]. Wood '135, Narvestad and Novotney '403 are all part of the same art. Workers in the art are entitled to the sum of the arts' teachings. Lugash '227 contributes nothing in addition to the sum of prior hydraulically powered loaders (Novotney '403, Wood '135 and defendant's prior loaders) and prior folding platform loaders (Narvestad, Peters and Jester).

THE COMBINATION OF THE PRIOR ART
FOLDING PLATFORM CONCEPT WITH
KNOWN POWERED LOADERS IN 1956
PRODUCED THE EXPECTED RESULT
OF POWERED RAISING OF A FOLDED
PLATFORM.

The function of the power means in raising the inverted platforms of Novotney '403 and Narvestad (App. Op. Br., pp. 37-38; Gabriel, Vol. III, pp. 800-801) is not opposed, plaintiffs only pointing out that in Narvestad there is a **prior** manual pivoting of the platform (as in Lugash '227) and a **subsequent** manual telescoping of the lifting arms (Ans. Br. of App., pp. 9-11). But in each, it is the natural and expected function of the power means to raise and lower the heavy loader parts whether the platforms are extended or inverted.

In the Novotney '403, Wood '135 and defendant's own prior art hydraulic loaders [Find. 11, Vol. I-B, p. 665; Exs. F. through O; Vogel, Vol. III, pp. 412-415] the power means *must* be operated to raise the lifting arms because of the rigid mechanical connections between the lifting arms and the hydraulic cylinders piston rods.

Defendant demonstrated at the trial and the district court correctly found that it was "a simple matter and did not require retooling" nor changes "major in character" to modify defendant's own prior art powered EB 1500 unitary construction loader to make its platform invert [Finds. 11 and 13A, Vol. I-B, p. 665]. To obtain the stowable loader, all that was necessary was to take an existing hydraulically powered, parallel arm loader and simply

invert the platform. If it had been a manually operated loader, the platform would have been stored manually. But, it was a powered loader and the powered raising of the manually inverted platform up under the truck bed was the **natural, obvious, expected** and in fact, **only** way the prior art device could be operated once the platform was manually inverted.

“These elements, when placed in aggregation, did not functionally operate differently than before. The pumps operated as pumps and the injector system operated as injectors, and the force of gravity operated as usual. We decide that none of these changes resulted in a new functional mode of operation, a development different in essential character or an unforeseeable improvement not obvious to mechanics skilled in the art.”

Jacuzzi Bros., Inc. v. Berkeley Pump Co., et al.,
191 F. 2d 632, 637 (C.A. 9, 1951).

LUGASH '227 WAS LIMITED TO THE FOLDING CONCEPT BEFORE THE PATENT OFFICE.

Contrary to the impression plaintiffs wish to make, the “basic combination” claimed by Lugash in his original application was that of an ordinary powered parallel armed load lifter [Ex. A, p. 11, claim 1]. The first object and original claim of Lugash '227 were not directed to the supposed basic combination of invertible platform and parallel linkage as asserted by plaintiffs (Ans. Br. of App. pp. 20-22). Lugash was required to specifically limit each of his claims to the “folding up aspect” of the platform and hinge means [Ex. B, pp. 21-24] to obtain issuance of the patent

just as the patentee in the *Calmar v. Cook* case (cited as *Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684) was required to distinguish over the prior art there cited. The *Calmar* case so-called Jepson type claims are still combination claims as here. The principal difference is in the failure of the Patent Office to consider or cite any patent pertinent to folding platforms or even dock loading in this case.

LUGASH '227 DOES NOT MEET THE UNEXPECTED RESULT TEST OF UNITED STATES v. ADAMS.

The Lugash '227 claims, limited to the folding-up aspect of the platform by the Patent Office, fail to meet the strict requirement of a "wholly unexpectedly" obtained result required in the *United States v. Adams*, U.S., 86 S.Ct. 708. **In Lugash '227 the folding up aspect is not unexpected in a vehicle loader.** That is clearly taught in each of Narvestad, Peters and Jester vehicle loaders. The provision of the pivotable Narvestad platform in a hydraulically powered loader such as Novotney '403, Wood '135 or defendant's prior loaders also produces the wholly **expected** result, a powered raising and lowering of the lifting arms and the platform whether it is extended or pivoted over.

In *Adams, supra*, the government had admitted that the result obtained was "unexpected" and the unchallenged testimony of the experts was that the "Skrivan-off" formulation relied upon by the government "was both dangerous and inoperable". (86 S. Ct. at 714).

In this case there is no such admission and absolutely **no expert testimony showing any unex-**

pected result. The weight of the evidence is to the exact opposite. The district court's findings do not even attempt to point out any result which could be considered unexpected. Patentability for Lugash '227 was predicated only on a more "**facile and efficient** manner" of operation for the loader, not an *unexpected* manner of operation thereof as required by the *Adams* case, *supra*.

THE EXHIBIT E-G AND AD LOADERS ARE A PART OF THE PRIOR ART.

Defendant relied upon its Exhibits E-G and AD to illustrate the prior art loaders commercially available prior to Lugash '227 which allowed dock loading by heavy fork-lift trucks. As plaintiffs are well aware, each of the loaders illustrated in defendant's Exhibit E-G were shown to be in the prior art by reference to the corroborating prior art patents of Exhibits C and D and Exhibit AB by Mr. Vogel at trial (Vol. III, pp. 389-402). The Daybrook loader which allows dock loading of pages 12 and 13 of Exhibit E-G was dated by the prior art Roberts patent (Vogel, Vol. III, pp. 396-400).

Exhibit AD, while undated, was given a prior art foundation by **both** plaintiffs' witness Goodman (Vol. III, pp. 74-76) and defendant's Mr. Vogel (Vol. III, pp. 409-411).

Plaintiffs knew of this relation between Exhibits E-G and AD and the other prior art patents and prior art brochures, but through omission and understatement have attempted to deliberately mislead this court into believing that the Exhibit E-G and AD loaders are not a part of the prior art (Ans. Br. of App. pp. 3, 14, 29, 37 and 67).

DEFENDANT'S RAMPING ACTION LOADERS DO NOT EMPLOY PARALLELOGRAM LINKAGE.

Plaintiffs attempt to confuse defendant's ramping action loaders with its "level ride" loaders which still have a slight ramping. **None of defendant's loaders employ exactly parallel lifting arms.** The so-called "level ride" platform loaders have a slight ramping action to overcome the settling of the truck bed on its springs during loading a heavy object onto the rear of the truck bed (Vogel Vol. III, p. 436). But defendant's ramping action platform loaders do not have parallel arms (Vol. III, p. 434) and are intended for use with "less unstable loads" (Vol. III, p. 553).

On his deposition, Mr. Vogel stated that the defendant's brochure showed a parallelogram linkage in a "broad sense" but that you couldn't tell from the drawing whether the arms were parallel or "slightly unparallel" [Ex. 18, p. 114]. He never admitted that all double arm loaders are parallelogram loaders as plaintiffs contend. He knew that even a so-called parallelogram arm loader should have slight ramping action to accommodate settling of the truck, **a fact apparently unknown to Lugash.** Thus, Vogel could not be sure whether Novotney (Vol. III, pp. 611-612) had lifting arms exactly parallel or preferably, slightly unparallel.

Plaintiffs improperly attempt to include within Lugash '227 load elevators with lifting arm linkages which are **purposely not parallel.** Although the difference in center spacing is small, the result on the end of at least 30 inches of lifting arm and 22 inches of platform is quite pronounced [Ex. E-G p. 3].

PLAINTIFFS ATTEMPT TO DISMISS THE MISMARKED LOADERS AS MINIMAL.

There is no evidence as to how many or how few of the mismarked Model H-23 loaders were sold by plaintiffs. Plaintiffs falsely *assume* that their numbers were minimal and clearly are over reaching in stating so to this court (Ans. Br. of App. pp. 64-66).

The alleged common practice of marking devices as being manufactured under one or more of the "following patents" referred to by plaintiffs was not followed in this case and is irrelevant. Plaintiffs are forced to discuss common practice of **others** in an attempt to distract the court's attention from what plaintiffs actually did.

No evidence was presented to the effect that plaintiffs were advised by their counsel to put the '196 patent numbers on the H-23 models as was done. Mr. Lugash, the patentee must be presumed to know that his second patent was directed to unitary construction claimed therein. It should have been obvious to Lugash that placing the motor and pump up under the truck bed in the H-23 models was not within his unitary construction concept of the '196 patent. No excuse or explanation of an innocent mistake was ever offered and none can be found in the record.

CONCLUSION.

Lugash '227 is no more than the sum of the prior art freely available to all persons working in the load elevator art. It produces no more than the results one would expect from a mechanic skilled in the art. Plaintiffs have attempted to refute this simple truth by creating issues and exhibits not before the trial court. Their many false allegations pointed out herein evidence the error of their reasoning.

The entire record in this case, the experts' testimony on the combined state of the art and the completely insufficient district court findings of invention in only a more "facile" manner of operating old folding loading devices should compel this court to find Lugash '227 invalid. The trial court's conclusions of validity and infringement for Lugash '227 should be reversed. The court's finding of innocent mistake on the false marking issue should also be reversed.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

GUY PORTER SMITH

No. 20267

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA ANITA MANUFACTURING CORPORATION,

Appellant and Cross-Appellee,

vs.

MAX J. LUGASH and MAXON INDUSTRIES, INC.,

Appellees and Cross-Appellants.

PETITION FOR REHEARING.

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No. 20267

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SANTA ANITA MANUFACTURING CORPORATION,

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vs.

MAX J. LUGASH and MAXON INDUSTRIES, INC.,

Appellees and Cross-Appellants.

PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, M. Oliver Koesch, Circuit Judges, and Bruce R. Thompson, District Judges:

Max J. Lugash and Maxon Industries, Inc. petition for rehearing on the grounds that the Court overlooked controlling matters of fact and law in its Opinion dated December 6, 1966.

1. This Court has not upset any of the findings which establish that Lugash '227 meets the statutory conditions of 35 U.S.C. 101, 102 and 103. Instead, the Court applied additional conditions of patentability, the Opinion stating (page 5) :

“But in the special case of combination patents, the ‘severe test’, . . . must *also* be applied and satisfied before a combination patent can be recognized.” (Emphasis added.)

The Patent Act of 1952 does not (1) discriminate between combination and other patents, nor (2) set up a severer test for patentability of combinations. This Court thus *adds* judicial conditions of patentability to the Patent Act of 1952, contrary to the “duty” imposed on all courts to give effect to Congress’ scheme. *Graham v. Deere*, 383 U.S. 1, 86 S. Ct. 684, 688. *Graham* explicitly rejected as incorrect such traditional non-statutory judicial tests as “new result” and “old result in a . . . more advantageous way.” This Court of Appeals, in overlooking the Supreme Court mandate to abandon non-statutory tests, is now in conflict with the Seventh Circuit, *Walt Disney Productions v. Fred A. Niles Communications*, No. 15703, decided November 9, 1966, with the Eighth Circuit, *American Infra-Red Radiant Co., Inc. et al. v. Lambert Industries, Inc., et al.*, Appeal Nos. 18054-5, 149 U.S.P.Q. 722, and with the Supreme Court.

In the case at bar, this Court did not limit the scope of its review to the determination of whether Lugash '227 and Lugash '196 satisfy the express statutory conditions and requirements for patentability as enacted by Congress in 35 U.S.C. 101, 102 and 103, as interpreted by *Graham v. Deere*, but rather superimposed conditions upon those specified by the legislature. We submit that such action was beyond the scope of judicial power, denies plaintiffs the equal protection of the patent laws, and deprives them of patent property without due process of law.

2. The opinion says, page 5, that Finding 8 is the only place reflecting the application of the "new function" test. This overlooks Finding 22, that "in Lugash '227 the parallelogram linkage lifting arms and platform have two distinct modes of cooperation, one for load bearing purposes and one for stowing purposes. This concept and any disclosure of a combination of elements for carrying the concepts into effect is completely lacking in *all* of the prior art relied on by defendant, including Narvestad, Peters and Jester." [C.T. p. 668.] Obviously, as the Finding says *all*, that includes Novotny '403.

Finding 22 has not been upset. Thus, Lugash '227 meets the "new function" test and is valid even by this Court's criteria. The Novotney yokes 8, which separate the platform from the parallelogram linkage systems, absolutely prevent those two elements from having Lugash's "distinct modes of cooperation" and from having Lugash's duality of function for load bearing and *stowing* purposes set out in Finding 22. Novotney's yokes 8, separating the platform and linkage systems, absolutely prohibit his device from *stowing* the platform as the trial court found, saying in Finding 16 that "it is mechanically *possible* to invert the platform in the said Novot-

ney device but not with substantially the same result as in plaintiffs' patent '227." [C.T. p. 666.]

The Court does not upset Findings 15-17 [C.T. p. 666] establishing Lugash '227 as a novel combination; or deny that the elements have a dual functional relationship producing the first practical stowable power loader (Opinion, p. 6, lines 17-19); or upset Findings [E.g., 18, 25, 28, C.T. pp. 666-669] which establish that the combinations actually claimed are not obvious. There being a new cooperative combination and relationship in Lugash '227, for purposes never before attained or appreciated, it is not essential to patentability that each of the elements perform a new function, *per se*. *Eibel Process v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, sustained the patentability of a *machine*, all of whose elements were old, and none of which elements, *per se*, performed any new function. That case has never been overruled.

3. The Court's opinion says (page 3) that it "will not weigh the evidence *de novo* to arrive at new findings". In *partially* upsetting Finding 8, this Court has inadvertently done what it says it will not do.

When the Court's opinion says (pp. 6-7) that in Novotney '403 "the only possible way to raise or lower the lifting arms, whether the platform is extended or inverted, is with the power means", this is the way the trial court viewed '403 and not different in any way. Where the trial court and this court differ, with respect to Finding 8, is that the trial court took into consideration certain evidence which this Court has overlooked. Finding 16 states that Novotney '403, even with an invertable platform, cannot arrive at substantially the same result as Lugash '227, based on plaintiff's evidence (Appellees' Br. pp. 8, 45) that in '403, so viewed, the power means cannot "move a load platform into and out of a *stored position*" nor can the lift-

ing arms “move an inverted platform into and out of a *stored position*”, as is stated in Finding 8. The whole evidence shows that the assumed structure of Novotney '403 gives in his combination, a device that cannot be stored and that it is thus true, as found in Finding 8, that for the first time, in Lugash '227 mechanical power is effective to move the platform into the *stored position*, *i.e.*, tucked away under the bed of the trucks so as not to interfere with the normal operation of the truck. By invalidating workable Lugash '227 on the basis of even the supposed but unworkable (see Appendix) disclosure of Novotney '403, this Court overrules, *sub silentio*, its prior decision in *International Manufacturing Co. v. Landon, Inc.*, 336 F. 2d 723, 726, on which the trial court relied. [C.T. pp. 566-567.] Finding 16, in stating “nothing in Novotney '403 suggests that he intended or appreciated any inversion of a load platform over a parallelogram linkage system”, is a precise, deliberate paraphrase of language employed by this Court in *National Sponge Cushion Co. v. Rubber Corp. of Cal.*, 286 F. 2d 731, at 734, which the Court now overrules, *sub silentio*, and contrary to *Eibel Process v. Minnesota & Ontario Paper, supra*. The best that can be said of Novotney '403 with the structure assumed is that platform inversion is accidental without any recognition of or possibility of storing the device [Finding 16, C.T. p. 666].

4. The Court's Opinion, page 6, says that “Novotney showed a folding or inverted platform”. The admissions of defendant's witnesses were that Novotney does not *show* it. [Tr. pp. 483, 779, 785, 786.] The statement of platform inversion being “mechanically *possible*” in Finding 16 is based only on “argument” and inferences drawn by defendant's witnesses from the drawings of '403. [Tr. pp. 483, 779, 785, 786.] It is sheer speculation to say that the drawings of '403, which are barren of *any thing* disposed in the unexplained yoke

slots, show a hinge means permitting platform inversion. Further, to so hold is to assert an impossibility on the face of such geometry as is actually disclosed. (Appellees' Br. pp. 41, 42.) and synthesizes an inoperable device (see Appendix).

All courts agree that the presumption of validity of a patent can be overcome only by "clear and convincing proof". *Patterson-Ballagh Corp. v. Moss* (C.A. 9, 1953), 201 F. 2d 403, 406. Biased inferences of this sort, drawn by defendant's witnesses from prior patents, are rejected by the Supreme Court as falling far short of the requisite level of proof. Squarely consistent with this Court's rulings in *Pursche v. Atlas Scraper*, 300 F. 2d 467, 477, 478, the vagueness of Novotney '403 on *any* kind of hinge, coupled with the biased opinions of defendant's witnesses "cannot be considered substantial evidence". Such cannot reasonably amount to "clear and convincing proof" of invalidity.

5. To hold that "combination patents" are a "special case" subject to a severer test is to virtually repeal the Patent Act of 1952 with respect to the great majority of all patents. *Cf.*, *Parks v. Booth* (1880), 102 U.S. 96, 104. The consequences extend beyond the case at bar and *Jeddeloh v. Coe*, *Appeal No. 20662*. We submit that the correct administration of the Patent Law in this circuit warrants a rehearing (en banc suggested) on the grounds urged above.

FULWIDER, PATTON, RIEBER,
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ROBERT W. FULWIDER,
FREDERICK E. MUELLER,
Attorneys for Lugash, et al.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

FREDERICK E. MUELLER,
*Attorney for Appellees and Cross-
Appellants.*

March 19, 1940.

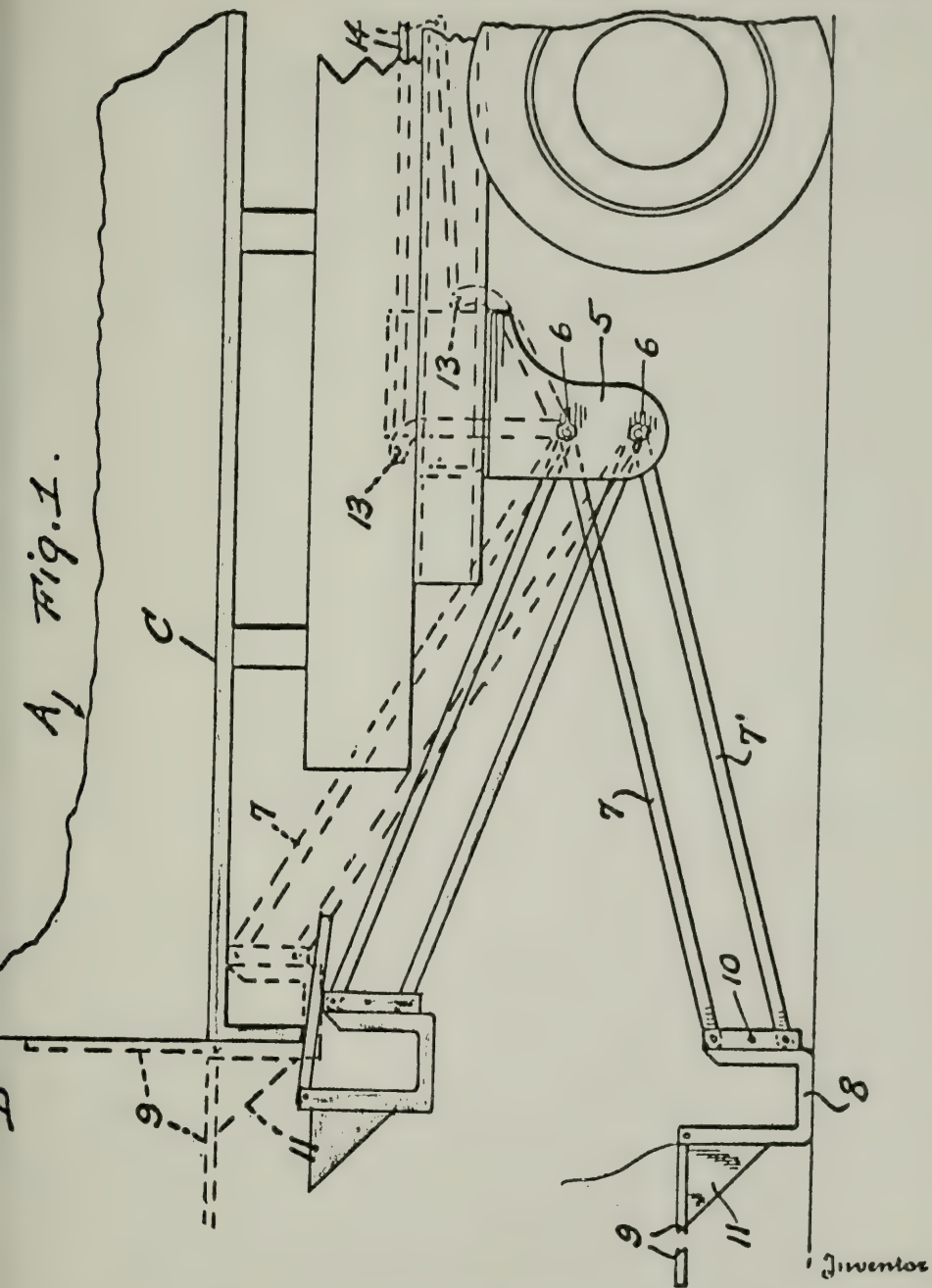
F. A. NOVOTNEY

2,194,403

END GATE LOADER

Filed June 19, 1939

2 Sheets-Sheet 1



Frank A. Novotney
by *L. B. James*
Attorney

No. 20308

(No. 20656 Consolidated)

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DePINTO and MARGARET F.

DePINTO,

Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,

Appellees.

FEB 7 1967

**Opening Brief of Appellants,
Angus J. and Margaret F. DePinto,
and Intervenor-Appellant, James P. Donohue**

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ANGUS J. DePINTO and MARGARET F.
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Intervenor-Appellant,

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PROVIDENT SECURITY LIFE INSURANCE COM-
PANY, and ALBERT J. DOIG,

Appellees.

**Opening Brief of Appellants,
Angus J. and Margaret F. DePinto,
and Intervenor-Appellant, James P. Donohue**

(For convenience, Provident Security Life Insurance Company will be referred to as "Provident"; United Security Life will be referred to as "United". "T.R." refers to Transcript of Record; "R.T." refers to Reporter's Transcript.)

JURISDICTION

This action was instituted in the United States District Court for the District of Arizona by the Appellants, Angus J. DePinto and his wife, Margaret F. DePinto, as plaintiffs, against Appellees, Provident Security Life Insurance Co., a corporation, and Albert J. Doig, as defendants. The purpose of the action was to secure an adjudication that a judgment in favor of Provident and against Angus J. DePinto in Cause No. Civ.-2974-Phx. (which is now the subject of an appeal to this Court in Cause No. 20553), does not constitute a community obligation of appellants which may be legally satisfied out of their community property, and to enjoin appellees from issuing, or causing to be issued, levied or served upon and against appellant's community property, writs of execution, writs of garnishment or other process for the satisfaction of the aforesaid judgment.

Jurisdiction in Cause No. Civ.-2974-Phx. was based on 28 *U.S.C.A.* § 1332, Diversity of Citizenship. The jurisdiction of the United States District Court in this action is ancillary to Cause No. Civ.-2974-Phx. 2 *Cyclopedia Federal Procedure*, 111 et seq.; *Pacific Railroad of Missouri v. Missouri Pacific Railroad Co.*, 111 U.S. 505, 4 S.Ct. 583, 28 L.Ed. 498; *Martina Theater Corp. v. Schine Chain Theaters, Inc.*, 278 F.2d 798 (2d Cir. 1960); *St. Louis-San Francisco Railroad Co. v. Byrnes*, 24 F.2d 66 (8th Cir. 1928).

The appeals to this Court were instituted pursuant to Rule 73 of the Federal Rules of Civil Procedure. 28 *U.S.C.A.* § 1291 and § 1292 grant to this Court jurisdiction to review the judgment of the lower Court and the order denying appellants' petition for a preliminary injunction.

STATEMENT OF THE CASE**1. Proceedings in the Lower Court.**

After the filing of appellants' Complaint (T.R. 1), a hearing was held in the lower Court upon appellants' petition for a preliminary injunction to restrain the sale of appellants' community property in satisfaction of the judgment rendered against DePinto in Cause No. Civ.-2974-Phx. After that hearing, the lower Court entered an order denying the requested relief. (T.R. 9, 54) Appellants then filed a notice of appeal to this Court (T.R. 13), and also a motion for injunction pending appeal. (T.R. 15) The motion was denied (T.R. 55). The appellees filed answers to appellants' Complaint, and motions for summary judgment. (T.R. 17, 22, 25, 44) The motions for summary judgment were based upon:

"Rule 56, the cases thereunder, the pleadings, oral testimony at the hearing on the application for a 'preliminary injunction', the certified transcript in Civil No. 2974, exhibits at the said hearing, presumptions, concessions of counsel, stipulations, and additional material admissible in evidence or otherwise usable at a trial." (T.R. 25)

In opposition to the appellees' motion for summary judgment, the appellants filed affidavits of Angus J. DePinto, Joseph S. Lentz and Paul M. Roca. (T.R. 29-34)

The motions for summary judgment were granted (T.R. 55), and judgment was entered in favor of appellees and against the appellants, dismissing the action. (T.R. 49) Appellants then filed their notice of appeal to this Court. (T.R. 51) That appeal was docketed herein as No. 20656, and by order of this Court, consolidated with Cause No. 20308.

Subsequent to the institution of these Appeals, DePinto was adjudicated a bankrupt and James P. Donohue was appointed as Trustee in Bankruptcy of the DePinto Estate. On the 15th of June, 1966, an order was entered herein granting the petition of the Trustee to intervene herein.

2. Facts.

By their answers to appellants' Complaint, the appellees admitted that, on or about the 28th day of June, 1965, a judgment was entered in Cause No. 2974-Phx., in favor of Provident and against Angus J. DePinto, in the sum of \$314,794.19, with interest, and that such judgment was based upon alleged acts or omissions of DePinto while serving as a member of the Board of Directors of United Security Life, an Arizona corporation, which was later merged into Provident. (T.R. 1, 17, 22)

At the hearing held upon appellants' petition for a preliminary injunction, Angus J. DePinto testified, among other things: The DePintos were married in Chicago, Illinois, in 1932. When they came to Arizona in 1936, they had no property. They have resided continuously in Phoenix, Arizona since 1936. They acquired property as the result of investing the proceeds from Dr. DePinto's medical practice. DePinto was elected to the Board of Directors of United Securities Life in October, 1955. He has never owned any of the capital stock of United, and has not had any financial interest in that company of any kind, shape or form. DePinto serve dupon the Board of Directors of United purely as a matter of friendship with the organizer of the company, a Mr. James E. Kelly. DePinto did not receive any compensation for serving as a member of the Board of Directors and was not promised anything in the way of compensation for such services. He had no reason

to anticipate that he would receive any financial benefit for his services as a member of the Board of United. DePinto served upon the Board until October of 1957. DePinto did not secure Mrs. DePinto's consent to his service upon the Board of Directors of United. He did not discuss the matter with her. (R.T. 13-18) DePinto was not benefited in any way, financially, socially or otherwise, from serving as a member of the Board of Directors of United. It did not result in any increase in his medical practice. (R.T. 21) DePinto became a director of United only to help the company and Mr. Kelly, not himself. (R.T. 41-42)

Mrs. DePinto testified, among other things: She and Dr. DePinto came to Phoenix from Chicago in 1936, at which time, they had no property. Thereafter, they continuously resided in Phoenix, Arizona and, at all times, have been husband and wife. The DePintos became acquainted with the James E. Kelly family in Carlsbad, California, in about 1947 or 1948. The Kellys later moved to Phoenix. About eight or ten years ago, Mrs. DePinto learned that Dr. DePinto was serving as a member of the Board of Directors of "Kelly's insurance company". Dr. DePinto did not ask whether she consented to, or approved of, his serving on the Board of Directors of United. Mrs. DePinto did not, at any time, tell Dr. DePinto that she approved or consented to such service. The DePintos have no financial interest in United Security Life. During their marriage, property of the DePintos was acquired other than by gifts or inheritance. If Mrs. DePinto had asked Dr. DePinto to "get off the Board" of United, he wouldn't have done it anyway. (R.T. 111-117)

The attorneys for appellees read into the record portions of the "Admitted facts", set forth in the pretrial conference

order which had been entered in Cause No. Civ.-2974-Phx., which, in part, read :

“51. On October 14, 1955, DePinto was elected a member of United’s Board of Directors. At the time DePinto became a director of United, he never intended to be an active director of United’s Board of Directors.

* * * * *

“53. In becoming a Director of United, DePinto responded to a request from Kelly that DePinto permit Kelly to use DePinto as a member of United’s Board of Directors.

“54. In agreeing to become a director of United, DePinto being a good friend of Kelly allowed Kelly the privilege of DePinto’s name.

“55. DePinto became a director of United because he was out to help Kelly and really thought he, Kelly, needed a helping hand and was there to give it.” (R.T. 33-34)

In opposition to appellees’ motions for summary judgment, the appellants filed affidavits of DePinto, Dr. Joseph S. Lentz and Paul M. Roca. The affidavit of Dr. DePinto reads :

“1. For more than 30 years last past, Affiant has engaged in the practice of medicine in the City of Phoenix, Arizona. His practice has been limited to obstetrics. During the period from 1950 to 1960, Affiant was fully occupied with his medical practice and had substantially all of the patients to whom he could give adequate attention. There was no reason for Affiant to engage in any activities designed to increase the number of persons who were seeking his services as an obstetrician.

“2. From the 14th day of October, 1955 until the 18th day of October, 1957, Affiant served as a member of the board of directors of United Security Life, an

Arizona corporation. Affiant served as a member of such board solely as an act of friendship and as an accommodation to one James E. Kelley, the organizer and then president of United Security Life. At no time did Affiant have any corporate stock or other financial interest in United Security Life. He did not receive and did not expect to receive any compensation for his services as a member of the board of directors.

"3. During the years 1955 to 1957, inclusive, United Security Life was a small and obscure business concern. It had no reputation in Arizona as a well-established and flourishing business establishment. Affiant's association with said company could not and did not lend status or prestige to Affiant and did not contribute or tend to contribute in any way to Affiant's medical practice or to the maintenance thereof.

"4. The circulation, if any, of Affiant's name as a director of United Security Life, to stockholders, policy holders or members of the public did not constitute the advertising of Affiant's practice as an obstetrician and did not contribute or tend to contribute in any way to Affiant's medical practice or the maintenance thereof. The friendship between the DePinto family and the family of James E. Kelley did not depend upon Affiant's service as a member of the board of directors of United Security Life. The marital community consisting of Affiant and his wife, Margaret DePinto, was not benefited, nor could it have received any benefits, monetary or otherwise, from Affiant's service as a member of the board of directors of United Security Life."

The Affidavit of Dr. Lentz reads:

"1. Affiant is a doctor of medicine and has engaged in the general practice of medicine as a physician and surgeon, in Phoenix, Arizona, for more than 20 years last past. Affiant is now, and, for approximately four years, has been, a member of the board of directors of National Producers Life Insurance Company and its

predecessor National Life and Casualty Company, an Arizona corporation. Affiant has been the medical director of National Producers Life Insurance Company and its predecessor National Life and Casualty Company for more than 10 years last past. At all times during his association with National Life and Casualty Company, it was a rapidly growing and successful business concern.

"2. Affiant has been acquainted with Dr. Angus J. DePinto for more than 20 years last past. During that time, Dr. DePinto has had the reputation of being a competent and highly successful obstetrician.

"3. Affiant is informed that from October, 1955 to October, 1957, Dr. DePinto served as a member of the board of directors of United Security Life, an insurance company organized under the laws of the State of Arizona. Affiant is further informed that at no time did Dr. DePinto have any stock or other financial interest in United Security Life and that he received no compensation for his services as a member of its Board of Directors. Based upon such information and based upon Affiant's experience as a doctor and member of the board of directors of a successful life insurance company, it is Affiant's opinion that the service of Dr. DePinto as a member of the board of directors of United Security Life could not have been of any benefit, financial or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto.

"4. It is the opinion of Affiant that Dr. DePinto's service as a member of the board of directors of United Security Life could not have been expected to, and did not, enhance the status or prestige of Dr. DePinto as a practicing obstetrician or otherwise, and did not contribute or tend to contribute in any way to Dr. DePinto's medical practice. Affiant is further of the opinion that the circulation, if any, of Dr. DePinto's

name as a director of United Security Life, to its stockholders, its policy holders and members of the general public, did not constitute the advertising of Dr. Pinto's practice as an obstetrician and could not have had any value in the maintenance of Dr. DePinto's practice as an obstetrician."

The Affidavit of Paul M. Roca reads :

"1. Affiant is a resident of Phoenix, Arizona, and a member of the law firm of Lewis, Roca, Scoville, Beauchamp & Linton. He is a member of the State Bar of Arizona and has practiced law in the City of Phoenix, Arizona, for more than 20 years last past.

"2. Affiant is one of the authors of the Arizona Insurance Code and, for more than 15 years last past, has specialized in the practice of insurance law. He has handled the legal work incident to the organization, incorporation and operation of numerous insurance companies organized under the laws of the State of Arizona, and has, from time to time, served as a member of their boards of directors.

"3. In the year 1952, Affiant handled the legal work incident to the organization and incorporation of United Security Life, an Arizona corporation. Thereafter, and until about March of 1955, Affiant acted as legal counsel for said corporation and for a period of time served as a member of its board of directors.

"4. Affiant is acquainted with Dr. Angus J. DePinto of Phoenix, Arizona. For many years, Dr. DePinto has had the reputation of being one of the most competent and successful obstetricians practicing in Phoenix, Arizona.

"5. Affiant is informed that Dr. DePinto became a member of the board of directors of United Security Life on or about October 14, 1955, and continued as a member of such board until on or about October 18, 1957. Affiant is further informed that at no time did

Dr. DePinto own any stock or have any financial interest in said company; that Dr. DePinto did not receive any compensation for serving on its board of directors and that Dr. DePinto attended few, if any, meetings of the board of directors and took no active participation in the management of said company.

"6. Based upon the information referred to in the preceding paragraph and based upon Affiant's knowledge of the insurance business in the State of Arizona and, particularly, his knowledge of the affairs of United Security Life, Affiant states that any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto's status and prestige in the community, could not have constituted 'advertising' of his practice as an obstetrician which would have had any value whatsoever and could not have resulted in any benefits, monetary or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto.

"7. It is the opinion of Affiant that, at the time Dr. DePinto became a member of the board of directors of United Security Life, it could not then be expected that Dr. DePinto or the marital community consisting of Dr. DePinto and his wife, Margaret DePinto, would receive any benefit of any kind as the result of Dr. DePinto's service on said board."

3. Questions.

The questions involved in these Appeals are as follows:

1. Did the pleadings, depositions and admissions on file, together with the affidavits, show that there was no genuine issue as to any material fact and that appellees were entitled to judgment as a matter of law?

2. Were appellants entitled to a preliminary injunction restraining appellees from attempting to satisfy the judgment entered against DePinto in Cause No. Civ.-2974-Phx. out of the community property of appellants?

C.

SPECIFICATIONS OF ERROR

Specification of Error No. 1.

The lower Court erred in entering summary judgment in favor of appellees and against the appellants dismissing the Complaint for the reasons:

A. Appellees were not entitled to a summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

B. The pleadings, depositions (Transcript of Testimony) and admissions on file, together with the affidavits, show that there was a genuine issue as to material facts and that appellees were not entitled to judgment as a matter of law.

C. The record herein discloses that the aforesaid judgment entered against DePinto in Cause No. Civ.-2974-Phx. was not a community obligation of appellants and could not legally be satisfied out of their community property.

Specification of Error No. 2.

The lower Court erred in failing to enter a preliminary injunction restraining appellees from attempting to satisfy the aforesaid judgment out of the community property of appellants during the pendency of the action, for the reason that appellants would suffer irreparable harm if their community property were sold under execution to satisfy the aforesaid judgment.

ARGUMENT**1. Record Does Not Support Summary Judgment.**

Arizona is a community property state. Since 1925, the Supreme Court of the State of Arizona and this Court have uniformly held that the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse. *Cosper v. Valley Bank*, 28 Ariz. 273, 237 P. 175; *Payne v. Williams*, 47 Ariz. 396, 56 P.2d 186; *Tway v. Payne*, 55 Ariz. 343, 101 P.2d 455; *Babcock v. Tam*, 156 F.2d 116 (9th Cir. 1946); *Shaw v. Greer*, 67 Ariz. 223, 194 P.2d 430; *Barr v. Petzhold*, 77 Ariz. 399, 273 P.2d 161.

With respect to tort claims, particularly those based on negligence, the Supreme Court of Arizona has held that the community is liable for damages resulting from the acts of a spouse which are done while furthering a community purpose. The case of *Hays v. Richardson*, 95 Ariz. 64, 386 P.2d 791, involved an automobile accident which occurred while the husband was on his way to pick up his wife and children. The Supreme Court of Arizona stated:

“Appellants contend that in determining whether the act was committed in furtherance of a community purpose, we must inquire into the very act itself and the mere fact the tort was committed while the spouse was on the way to do something for the benefit of the community is not controlling, citing 1 de Funiak, § 182 at p. 526 (1943). This is not the law in Arizona. In negligence cases we will not only inquire into the very act itself but the surrounding circumstances as well to make this determination because rarely does one run a red light or collide with another for the specific purpose of benefiting the community. In *Selaster v. Simmons*, 39 Ariz. 432, 7 P.2d 258 (1932) this court

considered the surrounding circumstances in determining there was a community purpose involved. See also *Chapman v. Salazar*, 40 Ariz. 215, 11 P.2d 613 (1932). Applying this rule we note that appellants came to Phoenix for one main reason, namely, to permit the children to participate in the T.V. show. When Hays went to pick up the wife and children after the show this was merely one phase of the entire project. We hold therefore that the husband was engaged in a community purpose at the time of the accident.

* * * * *

“It is undisputed that if one spouse is negligent while furthering a community purpose, the community is liable for damages resulting therefrom. *Selaster v. Simmons*, *supra*; *Chapman v. Salazar*, *supra*.”

In *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181, the Supreme Court of Arizona held that the community was liable for libelous and slanderous acts of the husband which were done to protect the interests of a company in which he was a partner. The Court said :

“The evidence leads to the irresistible conclusion that the libelous and slanderous acts were done to protect the financial interest of the Phoenix Fuel Company in a controversy arising because Watson believed that Wyatt had taken \$40 in money belonging to the company. Watson was a partner in the company and, therefore, in protecting its interest, was protecting his own interest, and his financial interest in the company (on his own statement of its nature) was a community one. Such being the case, we think that any act done by Watson, in this behalf, was intended for the benefit of the community, and the community must be liable for the unfortunate results thereof.”

Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773, involved an assault and battery upon the plaintiff by the defendant

husband. The attack occurred at the defendants' combination trading-post, store, restaurant and gas station. With respect to the contention that the conduct of the husband was not in furtherance of any community interest, the Supreme Court of Arizona stated:

"We do not agree, and point out that Buck Rodgers' intentions, by his own admissions were to protect the morals of his family, hotel guests, and his property against trespass. These were obviously community interests. His conduct and actions were intended to be performed in behalf of the community, and his separate property and that of the community are liable for the unfortunate results of his violent conduct. *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181; *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304."

The case of *Babcock v. Tam*, 156 F.2d 116 (9th Cir. 1946), was instituted for the purpose of enforcing a judgment against the community property of the judgment debtor and his wife. The judgment arose out of an accident in which the judgment debtor was involved while driving his automobile on business connected with his separate property. This Court held that the judgment could not be satisfied out of community property, and said:

"It is correctly claimed by appellant that the Arizona state community law relating to the issues of the instant case is similar in some respects to the Washington state law. *Selaster v. Simmons*, 1932, 39 Ariz. 432, 7 P.2d 258. See *Tway v. Payne*, 1940, 55 Ariz. 343, 101 P.2d 435. In the case of *McFadden v. Watson*, 1938, 41 Ariz. 110, 74 P.2d 1181, 1182, the court announced the governing Washington rule, as stated in *Floding v. Denholm*, 1905, 40 Wash. 463, 82 P. 738, 739: 'The rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt

created by a tort of either spouse, or one which is not for the benefit of the community.' In *Werker v. Knox*, 1938, 197 Wash. 453, 85 P.2d 1041, 1043, the court says: 'It is in those cases where the husband has caused a negligent injury through the use of an automobile that the tendency of the courts to go to an extreme limit to fix liability upon the community has been most clearly exhibited * * *.' This statement, however, is preceded by the sentence, '*But * * * there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community.*' In *Cosper v. Valley Bank*, 1925, 28 Ariz. 373, P. 175, it was held that where a judgment arises out of a transaction wholly regarding separate property and in no way affecting community interests, the person against whom the judgment was made is individually liable out of his separate property rather than the community as community property is liable only for community debts."

Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430, involved a question of whether or not judgments obtained against a Navajo County deputy sheriff and the Chief of Police of the City of Winslow could be collected from the community property of the judgment debtors and their respective wives. The judgment was predicated upon the malicious and unlawful arrest and imprisonment of the judgment creditor. The Supreme Court of Arizona held:

"It seems to us that the malicious tort committed by these defendants, not committed in connection with the management of the community property, may be likened to a separate crime of one of the spouses. In *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312, it was held that the marital community was not liable for an assault committed by a husband motorist who was angered because he thought plaintiff ran through an

arterial highway without stopping. The court reasoned that the tort was committed by the defendant as an aggressor and not for the benefit of the community nor connected with the husband's management thereof. None of the acts committed by these defendants were within the scope of the duties of the office, but rather they were entirely without it.

* * * * *

“Being of the opinion that a malicious tort committed by one of the spouses without the knowledge, consent, or ratification of the other and not resulting in a benefit to the community is not a community obligation, it follows that the debt sued on was the separate obligation of the defendant husbands and that the order quashing the writs of garnishment levied to collect salaries owing to the community was correctly entered.”

In the light of the above-mentioned authorities, there can be no doubt as to the law of the State of Arizona with respect to the liability of the community for the tort of one of the spouses. If the act, which gives rise to the cause of action, was committed by one of the spouses “while furthering a community purpose”, the community is liable for damages resulting therefrom. We do not, however, find any Arizona cases which deal with a tort committed by husband or wife while engaged in some activity which was embarked upon only for the purpose of accommodating a friend. In the case at Bar, we are concerned with a judgment which was obtained against Dr. DePinto upon the theory that he was negligent in carrying out his duties as a director of United Security Life. The record herein discloses, without contradiction, that Dr. DePinto was serving on the Board of Directors of United solely as an accommodation to his friend Kelly. (R.T. 13-38, 33-34) Under the circumstances, his conduct could no more impose liability upon the marital

community than if he had signed an accommodation note for Kelly. In *Perkins v. First National Bank of Holbrook*, 47 Ariz. 376, 56 P.2d 639, the Supreme Court of Arizona stated:

“Intervenors reduce their second assignment to this proposition of law: That Charles Perkins, as a member of the community, had no power under the law without the knowledge and consent of his wife, Mary L. Perkins, to use the community assets to guarantee the debt of a stranger to the community; it deriving no benefit therefrom. This proposition is confirmatory of what is settled law in this jurisdiction. Section 2175, Revised Code of 1928, makes the community property liable for the community debts contracted by the husband. And in *Cosper v. Valley Bank*, 28 Ariz. 373, 237 Pac. 175, we held the community was not liable for a debt contracted by the husband in no way connected with the community and from which the community received no benefit. This would protect the community from a liability of the husband as surety or guarantor, unless it was in aid of, or for, the community. *Sun Life Assur. Co. v. Outler*, 172 Wash. 540, 20 Pac. (2) 1110.”

Again, in *Payne v. Williams*, 47 Ariz. 396, 56 P.2d 186, the Supreme Court of Arizona said:

“The motion to quash was based on the theory (a) that the community assets may not be held for a separate debt of one of the spouses, and (b) that the indorsement of a note for accommodation only is a separate debt of the spouse so indorsing and not of the community. We think the law in Arizona has been well settled in the affirmative on the first point by the case of *Cosper v. Valley Bank*, 28 Ariz. 373, 237 Pac. 175. And that an accommodation note signed by the husband, and which does not benefit the community estate, is his separate debt is so plain that it needs no argument to support it.” (Emphasis supplied.)

It will be remembered that Dr. DePinto had no financial interest whatsoever in United. He did not receive and did not expect to receive any compensation whatsoever for serving on its Board of Directors. (R.T. 14-16). He obtained no benefit of any kind whatsoever from serving on the Board of United other than the personal satisfaction of helping a friend. (R.T. 21). In denying appellants' Motion for Preliminary Injunction the lower Court concluded that Dr. DePinto's service on the Board of Directors of United "was for a community purpose and was beneficial to the community of the plaintiffs." This conclusion was not predicated upon any evidence in the record with the exception of testimony that a friendly relationship existed between the DePintos and the Kellys. The lower Court said:

"In our free enterprise society the corporation is the specific organ through which a modern society discharges its basic economic functions. The directors of corporations hold great power and have become a major leadership group, and as such have great responsibilities to the enterprise and the people they manage, and to the economy and society.* As a concomitant of such responsibilities and power, directors of corporations enjoy positions of prestige and high status in the community.

Such status and such prestige along would, without anything else, confer a benefit upon the community of the plaintiffs where the husband as here served on the Board of Directors of a profit corporation.

In this case we have more: we have such direct benefits as the circulation of the plaintiff-husband's name to members of the public to whom stock in the defendant corporation was being sold, thus resulting in an ethical form of advertising for a physician and surgeon. Similar benefits flow from the circulation of his name among the policyholders and the other directors in the defendant insurance company.

Even the assertion by the plaintiff-husband that he took a place on the Board of Directors in order to accommodate a friend of the plaintiff, fostered a community purpose by furthering the friendship between the De Pinto marital community and the Kelly marital community. (*See for example, A.R.S. § 10-191 et seq. concerning the duties of directors.)” (T.R. 10).

The assumptions which were made by the trial Court were completely dissipated by the testimony and affidavits of Dr. DePinto, and the affidavits of Dr. Lentz and Paul Roca hereinabove quoted. (T.R. 29-34.) Paul Roca is a prominent Phoenix attorney who is one of the authors of the Arizona Insurance Code and who, for more than 15 years last past, has specialized in the practice of insurance law. He handled the legal work incident to the organization, incorporation and operation of numerous insurance companies including United. Mr. Roca stated:

“that any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto’s status and prestige in the community, could not have constituted ‘advertising’ of his practice as an obstetrician which would have had any value whatsoever and could not have resulted in any benefits, monetary or otherwise, to Dr. DePinto or to the marital community consisting of Dr. DePinto and his wife, Margaret DePinto.”

The lower Court felt that Dr. DePinto’s service on the Board of United “fostered a community purpose by furthering the friendship between the DePinto marital community and the Kelly marital community”. We submit that, under the law of the State of Arizona, the community cannot

be held liable for an act of the husband which is performed solely as an accommodation to a friend. If a husband makes a commitment for the benefit of a corporation in which he has a substantial financial (community) interest, such act will be deemed to be in furtherance of the community affairs. As indeed it is. *Donato v. Fishburn*, 90 Ariz. 210, 367 P.2d 245. *Osborn v. Massachusetts Bonding and Insurance Co.*, 229 F.Supp. 674 (D.C. Ariz. 1964). Compare, however, the case of *American Surety Co. of N.Y. v. Sandberg*, 244 F. 701 (9th Cir. 1917), wherein this Court held that the community was not liable upon an indemnity agreement signed by the husband on behalf of a corporation in which he had no financial interest. The trial Court found: "That neither of the defendants was ever a stockholder of the construction company, and neither had any financial interest in that company, and Peter (the husband) signed the indemnity agreement at the request and for the accommodation of one Mettler, who is a large stockholder and an officer of the construction company, and an old friend of Peter's * * *." The *American Surety Company* case was predicated upon Washington law. The Supreme Court of Arizona has said that: "We have always held that our community property law was more like that of the State of Washington than of any of the other community states, and that decisions from that state were very persuasive." *McFadden v. Watson*, *supra*.

Not only have the Courts held that an act done merely because of friendship will not be considered as "furthering a community purpose", but that an act done because of blood relationship will not be so considered. In the case of *Sun Life Assur. of Canada v. Outler*, 172 Wash. 540, 20 P.2d 1110, plaintiff instituted an action to recover the amount due on a promissory note executed by Author P.

Outler and his wife, Irma. Irma was the daughter of the defendants, Mr. and Mrs. George E. Kellough. Mr. Kellough guaranteed payment of the promissory note solely as an accommodation for his daughter-in-law. The Supreme Court of Washington overruled one of its prior decisions and stated:

“The application of the principal of that case, to the case at bar, would simply mean that the husband’s indorsement, without consideration, of the son-in-law’s note, would create a community obligation—this upon the theory that the wife, prompted by maternal affection, would be presumed to give her consent and approval to the transaction, even though she did not know about it. Such an act of a husband, depending upon the assumption of knowledge of his wife’s affection for their child, does not meet the test of business or benefit to the community. The marital community, with respect to the subject-matter under consideration, is essentially a business concern, and the power of its manager, the husband, should be controlled strictly by his statutory authority, not by what may appear on the surface to be the promptings of a generous paternal impulse. Otherwise, without consent or knowledge of the wife, the community estate may be depleted by transactions in which it can have no possible chance to benefit.”

It should be noted that the *Sun Life Assur. Company* case was cited by the Supreme Court of the State of Arizona in support of its decision in *Perkins v. First National Bank of Holbrook, supra*.

In the case of *Forsythe v. Paschal*, 34 Ariz. 380, 271 P. 865, the Supreme Court of Arizona explained why the marital community should be insulated from obligations incurred by one of the spouses other than in furtherance of some community purpose:

“The state’s principal interest in the marriage status is the protection of the family as a unit, and of the minor children. The whole history of our legislation in Arizona, as well as elsewhere, shows this to be true. There are few things which would do more to destroy the solidarity of family life and the proper maintenance of the children of the marriage than the possibility that the community estate and earnings primarily intended by the state for this protection could be diverted from that purpose to satisfy debts in no way connected with the family. Even in the ordinary partnership, a judgment against the individual partner cannot be collected from partnership assets until after the business is wound up. Much more is this necessarily true of the marital partnership, and since it is against public policy for that to be destroyed, except when the state, for good cause shown, approves the dissolution of the family unit, until such legal dissolution occurs it would follow a creditor of the one partner may not enforce a judgment for an individual debt against the property of the community.”

We respectfully submit that, in the case at Bar, there is no evidence which supports, in any way, the conclusion that Dr. DePinto’s services upon the Board of Directors of United were “in furtherance of a community purpose.” To the contrary, the evidence expressly, specifically and incontrovertibly, shows that such service was not in furtherance of such purpose. The entry of summary judgment against appellants was, therefore, erroneous, and must be reversed.

2. Preliminary Injunction.

It is apparent that, after a trial on the merits, appellants will be entitled to a decree enjoining appellees from having judgment in Cause No. Civ.-2974-Phx. satisfied out of their

community property. *Merritt v. Newkirk*, 155 Wash. 517, 285 P. 442; *Dempsey v. Oliver*, 93 Ariz. 238, 379 P.2d 908; 42 C.J.S. 53, § 552, 41 C.J.S. 979, § 458e. Although an order was entered in the DePinto bankruptcy proceedings staying execution sale of appellants' property, appellees have asked the Bankruptcy Court for permission to proceed with such sale. It is obvious that a forced sale of such properties, pending the final disposition of this action, will result in irreparable injury to appellants for the reasons stated in their verified Complaint:

"(a) Plaintiffs' community personal property will be sold under execution at a forced sale without right of redemption and at prices substantially less than the value thereof.

"(b) Plaintiffs' community real property will be sold under execution at forced sale and at prices substantially less than the value thereof.

"(c) Numerous parcels and items of plaintiffs' community real and personal property may be sold to numerous buyers with the result that plaintiffs will be forced to maintain multiple actions for the purpose of recovering their property.

"(d) Plaintiffs' community property will wrongfully and illegally get into the hands of third parties who may dissipate the same or otherwise place the same beyond recovery by plaintiffs.

"(e) Plaintiffs' bank accounts will be subject to garnishment with the result that plaintiffs will not be able to carry on their personal and business affairs in an orderly manner.

"(f) Plaintiffs will be wrongfully and illegally deprived of their property under circumstances which will make it impossible to determine plaintiffs' damage with any degree of certainty in an action or actions at law.

“(g) The aforesaid judgment will constitute an apparent lien or cloud upon the title to plaintiffs’ said community property which will make it impossible for plaintiffs to sell, mortgage or otherwise deal with said property.” (T.R. 3)

Upon reversal of the judgment herein, the case should be remanded to the lower Court, with instructions to issue a preliminary injunction as prayed for by appellants. In view of the fact that the properties of appellants are in custody of the Bankruptcy Court, such injunction should be conditioned on the furnishing of a nominal bond.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.

(Exhibits Follow)

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(No. 20656 Consolidated)

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

1966
FEB 7 1967

ANGUS J. DE PINTO and MARGARET F. DE PINTO,

Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the
Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY,
and ALBERT J. DOIG,

Appellees.

BRIEF OF APPELLEES

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No. 20308

(No. 20656 Consolidated)

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ANGUS J. DE PINTO and MARGARET F. DE PINTO,

Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the
Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY,
and ALBERT J. DOIG,

Appellees.

BRIEF OF APPELLEES

Opinion Below

A prayer for a preliminary injunction was denied in an opinion and order. (T.R. 9). Later appellees moved for summary judgment which was granted in an order which incorporated the

Jurisdiction

Appellees incorporate herein the statement of jurisdiction contained in appellants' opening brief at page 2 thereof.

Questions Presented

- (1) Whether there was any genuine issue of material fact preventing summary judgment?
- (2) Whether appellees were entitled to summary judgment as a matter of law?
- (3) Whether the trial judge abused his discretion in denying appellants a preliminary injunction?

Statement Of The Case

Following the June 28, 1965 entry of judgment against appellant Angus J. DePinto in Doig v. DePinto and Provident, Civil No. 2974, Phoenix, U.S. District Court, appellants filed this action on July 12, 1965. The complaint seeks a permanent injunction prohibiting execution of the judgment in Civil No. 2974 against the community property of appellants Angus J. DePinto and Margaret F. DePinto. (T.R. 1, 4, 5). A motion for a temporary restraining order without notice was denied by U.S. District Judge James Walsh. (T.R. 7). On July 21, 1965, U.S. District Judge Carl A. Muecke heard testimony and received evidence with respect to appellants' motion

for a preliminary injunction. (R.T. 1). After hearing appellants' evidence and lengthy oral argument, several memoranda were filed after which Judge Muecke filed on August 4, 1965 a written opinion and order denying the preliminary injunction. (T.R. 9, 54). A motion for an injunction pending appeal of the denial of the motion for a preliminary injunction was then filed and later denied. (T.R. 54, 55).

Thereafter, on August 14, 1965, appellants filed a motion in this court seeking an injunction pending appeal. However, on August 18, 1965, while the motion here was pending, appellant Angus J. DePinto filed a voluntary petition for an arrangement under Chapter XI of the Bankruptcy Act, and obtained, without notice, a restraining order signed by a Referee in Bankruptcy which order prevented further execution of the judgment in Civil No. 2974. About September 14, 1965, appellant Angus J. DePinto filed sworn schedules in the said bankruptcy proceeding listing total community liabilities of \$2,113,931.93 and total community assets of \$754,109.44. (Exh. E, No. 20460 here). Later, on or about September 20, 1965, this court, without having been given notice by appellants of the existence of the restraining order issued by the Referee in Bankruptcy, denied appellants' motion for an injunction pending appeal.

Subsequently, appellees filed the motion for summary judgment which was granted about December 8, 1965.

On March 10, 1966 appellant Angus J. DePinto filed a voluntary consent to be adjudicated a bankrupt. His spouse has filed a statement therein to the effect that such bankruptcy comprehends the community property. Following the voluntary consent of appellants, the trustee in bankruptcy intervened here. To date the restraining order prohibiting execution of the judgment in Civil No. 2974 is still in force in the bankruptcy court despite efforts of appellee to obtain a decision thereon.

The facts adduced at the July 21, 1965 hearing on appellants' motion for a preliminary injunction are as follows:

Appellants moved to Phoenix, Arizona in 1936. (R.T. 11, 111). Upon arrival there, according to the testimony of each, they owned nothing. (R.T. 10, 112). Each testified that everything acquired subsequent to 1936 was community property. (R.T. 10, 11, 111, 112).

In 1947 the appellants met James E. Kelly and the latter's wife in Carlsbad, California, before the Kellys became residents of Phoenix, Arizona. (R.T. 28, 112). The DePintos became very friendly with the Kellys, occupied summer homes next to each other in Carlsbad, California from 1948 until 1960, entertained each other, visited each other's homes, and remained friends until 1959 or 1960. (R.T. 28, 112). Mrs. DePinto and Mrs. Kelly were friends as well as the children of both families. (R.T. 66). Angus J. DePinto made several trips from Phoenix, Arizona to Carlsbad, California with

James E. Kelly via either automobile or airplane. (R.T. 28).

On June 16, 1952, Life Underwriters, Inc., a management corporation, was incorporated under the laws of Arizona. (R.T. 29). James E. Kelly was the president and a director of Life Underwriters, Inc. (R.T. 30). Prior to October 1, 1952, Kelly discussed with DePinto the business affairs of Life Underwriters, Inc. (R.T. 29). DePinto understood that the purpose of Life Underwriters, Inc. was to take over smaller companies and to sell life insurance. (R.T. 29). On October 1, 1952, Life Underwriters, Inc. issued a prospectus for the sale of stock to the public. (R.T. 30). The said prospectus stated that DePinto was one of Life Underwriters, Inc.'s directors. (R.T. 30). DePinto was, prior to October 18, 1957, for a period of two years, a director of Life Underwriters, Inc., and DePinto knew that his name was being used as a director of Life Underwriters, Inc. (R.T. 30). DePinto also owned stock in Life Underwriters, Inc. for which he paid \$2,000. (R.T. 29, 30).

On November 21, 1952, about a month and a half after the Life Underwriters, Inc. prospectus was issued, articles of incorporation were filed for United Security Life. (R.T. 31). Through Kelly, DePinto became aware, late in November or December of 1952, that United Security Life was in existence. (R.T. 31). Prior to December 15, 1952, United also prepared a prospectus for the sale of its stock to the public. (R.T. 31). The said United Security

Life prospectus, under the heading entitled "Relationship with Life Underwriters, Inc.", stated that Life Underwriters, Inc. was the exclusive operating management and sales agent for United Security Life, and that DePinto was a director of Life Underwriters, Inc. (R.T. 31, 32). The said United prospectus set forth information about DePinto. (Exh. A, R.T. 126). DePinto both knew and presumed that Kelly was using DePinto's name in prospecti issued by United, and actually saw a prospectus himself. (R.T. 32, 105). Stock in United was sold to the public by 25 to 40 salesmen, and life insurance was sold to members of the armed forces. (R.T. 32). DePinto knew that his name was being used by Kelly in selling stock of United to the public. (R.T. 45).

Thereafter, on March 29, 1955, a meeting of United's board of directors was held at which a Doctor Harry Cumming or James Burke complained about the management of United under Kelly. (R.T. 33). DePinto attended the said March 29, 1955 meeting because Kelly asked him to attend, and while at the meeting he saw and heard James Burke and Doctor Harry Cumming. (R.T. 33). The gist of the complaints by Burke was that United was not being administered properly, and that the stockholders were in danger of losing their money. (R.T. 40).

On October 14, 1955 DePinto was elected a director of United. (R.T. 33). DePinto became a director to help United and Kelly. (R.T.

At the time DePinto became a director of United, he knew that United was selling life insurance to members of the armed forces at Army, Navy, and Air Force depots. (R.T. 34). At the time he became a director of United, DePinto never intended to be active although he had previously had three years experience as a member of the board of directors of the Phoenix Country Club whose meetings he attended regularly. (R.T. 33). In becoming a director of United, DePinto fostered a family friendship by "helping a fellow who already was a friend." (R.T. 70).

A few months after becoming a director of United, DePinto's spouse, appellant Margaret F. DePinto, was aware of the fact, but never objected to his being a director of United. (R.T. 71).

During his tenure as a director of United, DePinto attended none of the meetings of the board of directors. (R.T. 36). When such directors' meetings were held, DePinto was earning money for the marital community. (R.T. 45). One of his patients was Mrs. Kelly whose child he delivered. (R.T. 54). DePinto was unable to state that no other patients were referred to him by other directors of United. (R.T. 54).

Prior to becoming a director of United in 1955, DePinto had acquired, before 1948, a parcel of real estate in Yuma County, Arizona in joint ownership with one J.L. Jenkins. (R.T. 42). J.L. Jenkins also became a director of United at about the time DePinto became a director. (R.T. 42).

When asked by members of the public what he thought of United, DePinto never told any such persons that he was not acting on behalf of the community while a director of United, and it was not until after the complaint was filed in Civil No. 2974 that he first so claimed. (R.T. 57, 60). Except for the indebtedness reflected in the judgment in Civil No. 2974, DePinto never disclaimed any other indebtedness as not owing by the marital community on the ground that it was a separate debt. (R.T. 64). Every debt ever paid by DePinto in the preceding 29 years was paid by DePinto from community property funds. (R.T. 64). In 1960 DePinto posted \$175,000 of the community's cash as collateral to secure a supersedeas bond on appeal from the judgment entered against him in Civil No. 2974. (R.T. 51).

DePinto's spouse was told very little by DePinto concerning the management of the marital community, and was even unaware he had purchased stock in Life Underwriters, Inc. (R.T. 55, 118). DePinto wrote the checks, took care of banking matters, arranged for financing of buildings, signed leases with the tenants, and in general supervised and managed the business affairs of the community. (R.T. 118).

Other than the claim being made here that DePinto's directorship in United was not a community activity, DePinto never had any separate activities and every business matter he engaged in was one

in which DePinto's spouse shared both the profits and the losses.

(R.T. 52, 62, 63).

During his service as a director of United Security Life, DePinto traveled to San Diego, California with James E. Kelly via airplane, and on at least one occasion his air fare was paid for by United Security Life. (R.T. 43). When asked to produce evidence which would show that he had repaid such air fare, DePinto was unable to produce a cancelled check and claimed that he paid the sum to Kelly in cash upon arrival in San Diego. (R.T. 44). He did not explain why the ticket was paid for in cash upon arrival in San Diego and not in cash before boarding the airplane in Phoenix.

During the years 1960 through 1964, appellants claimed federal income tax deductions for the cost of litigating Civil No. 2974 as incurred "for the management, conservation, or maintenance of property held for the production of income." (Exh. C, D, E-1, E-2, F). The only property owned by appellants being community property, the said deductions were claimed for the conservation of community property. (R.T. 10, 11, 111, 112).

The first time DePinto ever claimed that when acting as a director of United he was not serving a community purpose was after the complaint was filed in Civil No. 2974, and while with his legal counsel. (R.T. 60). Prior to that time it was his understanding that he had no liability or responsibility in acting as a director, and therefore had no occasion to disavow the activity as community activity.

Before turning to the specific legal and factual materials sustaining the district court's orders granting summary injunction and denying a preliminary injunction, the court is earnestly asked to consider the following information concerning who and what is now involved in the instant litigation.

This court has already recognized the importance in any litigation of knowing who are the real parties in interest in contrast to who may be appearing for them in court. Niesz v. Gorsuch, 9 Cir., 1961, 295 F.2d 909; DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826; Gorsuch v. Fireman's Fund Insurance Company, ____ F.2d ____ (Dck. No. 19887, 9 Cir., 1966). It did so by pointing out that the real beneficiaries of any judgment in Civil No. 2974 were the 383 former stockholders of United Security Life. Such a judicial approach is a common practice by courts who use such knowledge to judge the weight to be given arguments being advanced, and to help fashion proper remedies.

Consequently, it is equally important to focus attention on the fact that appellants are no longer the real litigants here, but are merely nominal parties who have no stake in the outcome of this litigation or that other pending appeal entitled DePinto and Donohue v. Provident Security Life Insurance Company, Dck. No. 20553, 9 Cir.

Because appellants voluntarily consented to be adjudicated

bankrupt on March 10, 1966, having filed sworn schedules therein showing that the community's total liabilities were \$2,113,931.93 whereas its total assets were only \$754,109.44, it is evident that no monetary benefit could accrue to them should it ever be held in this litigation that the judgment and interest of \$462,739.74 in Civil No. 2974 could not lawfully be satisfied from the community assets. Why? Because all that would happen, insofar as appellants are concerned, is that the community's total of liabilities would be reduced from \$2,113,931.93 to \$1,651,192.19 while the total of assets would remain at \$754,109.44. Thus, the marital community in bankruptcy would still owe \$897,082.75 more than its total assets even if a decision were ultimately rendered here or in Civil No. 2974 (Dck. No. 20553, 9 Cir.) eliminating the \$462,739.74 judgment or preventing its collection from the community assets. Nor would appellants benefit monetarily insofar as separate property is concerned since each has testified repeatedly herein that everything appellants own is community property.

Thus, it appears reasonable to ask why bankrupt appellants would press this appeal in view of the expensive printed briefs which have been filed in the two matters, the continued presence of qualified counsel who are acting for appellants, and the cost of further research and legal counsel in proceeding with this and the other appeal. In short, why would a bankrupt marital community expend

large sums of money to continue an appeal attempting to eliminate a community liability which, if removed, still leaves that community with \$897,082.75 more in debts than assets? The answer is that such persons would not expend such sums, and it is therefore obvious that the real parties in interest here are the general creditors of appellants' marital community in bankruptcy whose claims arose several years after the first two judgments were entered in Civil No. 2974. These bankruptcy general creditors are formally represented by the trustee in bankruptcy who intervened here recently. They are joined in spirit, if not in substance, by the Massachusetts Mutual Life Insurance Company, which, also represented by Evans, Kitchel & Jenckes, counsel for appellants here, filed a petition in the bankruptcy court on June 2, 1966 seeking authority to proceed against Angus J. DePinto in a suit filed before judgment was entered in Civil No. 2974, on a promissory note in the approximate amount of \$1,063,007.50. The petition also seeks authority to foreclose on a \$1,063,007.50 first mortgage owed by Trosco Land, Inc. Appellee has been assured by competent and experienced owners and operators of the kind of medical building, which is the subject of the Massachusetts Mutual Life Insurance Company mortgage granted to Trosco Land, Inc., that such foreclosure will fall short by at least \$300,000. Thus, Massachusetts Mutual Life Insurance Company will be a general creditor of appellants community for the approximate sum of

\$300,000 along with the approximately \$355,112.03 of additional

Trosco Land, Inc. debts which DePinto guaranteed and which will
1
fall upon the marital community. The total of the above items plus

the \$70,000 owed by the community to James C. Trisolieri is
2
\$725,112.03. Thus, it is general creditors who are the real parties
in interest. Appellants are merely bystanders.

The foregoing reflects that those who are appealing here in
the guise of protectors of the sanctity of marital community property
anxious to prevent fraud against a wife are actually commercial
general creditors of a bankrupt community who are being led into
battle by Massachusetts Mutual Life Insurance Company and the
trustee in bankruptcy. Appellee acknowledges that there is nothing
wrong at all with the efforts of creditors who extended credit to
appellants' community several years after the first two judgments

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1. Appellants own approximately one third of the outstanding stock of Trosco Land, Inc. the corporation whose debts of \$1,418,119.53 DePinto guaranteed according to Schedule A-4 of Exhibit E, Docket No. 20460 here. This is the corporation against whom Massachusetts Mutual Life Insurance Company is foreclosing the first mortgage of approximately \$1,063,007.50. Horton v. Donohue-Kelly Banking Co., Wash., 1986, 46 P. 409, held where the husband held stock in the corporation for the benefit of the community, liability incurred by reason of husband's guaranty of corporate debt, community property is liable. Appellant DePinto testified here that when he assumed the directorship of Trosco Land, Inc., he did so with the intent of benefiting the marital community. (R.T. 47). Thus, he is liable and the community is liable on the aforesaid guarantees.
 2. See Schedule A-3 of Exhibit E attached to Petition for Writ of Mandamus in Docket No. 20460 here. This \$70,000 debt came into existence in May of 1965 as a result of the purchase by appellants of the stock in Trosco Land, Inc. owned by Mr. Trisolieri.

in Civil No. 2974 were entered from attempting to collect their
debts by eliminating the judgment in Civil No. 2974 rendered for
the benefit of United's former shareholders. However, question
is raised as to the validity of invoking here the sanctity of the
community property when that marital community is hopelessly
insolvent, and neither member of that community can obtain \$1
of benefit from the decision which the general creditors request
in the name of the marital community. Query also whether that
community exists any longer insofar as the community property
in bankruptcy is concerned?

For the following reasons, the present appeals should be
dismissed.

I

The District Court Did Not Err In Granting Appellees'
Motions For Summary Judgment Because There Was
No Genuine Issue Of Material Fact And Appellees Were
Entitled To It In Law.

Rule 56 (c), Federal Rules of Civil Procedure, provides
that the judgment sought by a motion for summary judgment:

"... shall be rendered forthwith if the pleadings,

3. No doubt these general creditors will proceed, in the event no
success is effected here or in Dck. No. 20553, to the bankruptcy
court in an effort to have the judicial lien in Dck. No. 20553
declared null and void so that the judgment in Dck. No. 20553
would share and share alike with their \$725, 112.03 in which
event the recovery in Dck. No. 20553 could not exceed 39 cents

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. "

Thus, the questions with respect to appellants' appeal from the summary judgment granted by Judge Muecke are: (A) what is the applicable law, and (B) are there any genuine issues of material fact?

A.

Under Present Arizona Law The Community Is Liable For The Negligence Or Breach Of Fiduciary Duty Of The Husband Committed While A Corporate Director Whether Or Not He Was Serving A Community Purpose While Acting As A Director.

The major premise of appellants' legal argument is that the marital community in Arizona is not liable for the negligence or breach of fiduciary duty of the husband as a corporate director unless while a director he was serving one or more community purposes. Their minor premise is that Angus J. DePinto did not serve any community purpose in accepting and acting as a corporate director of United Security Life. Hereafter, in subpart B, appellee will note some of the community purposes which were furthered



by DePinto's assumption of a corporate directorship in United Security Life, and the reasons why there is no genuine dispute as to each community purpose or benefit on the assumption that the rule is as stated by appellants. Here, however, the point is submitted that recent Arizona cases have made it plain that the corporate director who commits a tort or breach of fiduciary duty against his corporation cannot hide behind the skirts of his wife when called to account from the only property most citizens of a community property state own - community property.

In 1956 the Arizona Supreme Court in Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956), discredited its previous practice of placing the greatest weight on the community property decisions of the state of Washington. After a lengthy review and analysis of the history and theory of the Arizona community property system, the court said:

(1) " The State of Washington adopted its community property act on December 2, 1869, following Arizona by nearly four years."

(2) "... while the source of the Arizona community property system is California, a comparison with the Constitution of the State of Texas, 1845, Vernon's Ann. St. Article VII, Section 19, shows that Article XI, Section 14, Constitution of California, *supra*, is identical to that of Texas."

(3) " From the foregoing we are compelled to conclude that the decisions of the State of Washington, while informative, are not necessarily more persuasive than either those of the state of California or Texas. "

Therefore, since there is no Arizona decision holding that the community is not liable for the negligence or breach of fiduciary duty of the husband corporate director unless he was furthering a community purpose or benefit while holding such office, what is the law of California and Texas?

In California, community property is subject to liability for the husband's torts whether committed while serving a community purpose or not. Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941). See also Vest v. Superior Court, 294 P.2d 988 (D.C. App. 1st). The same rule applies in Texas where the community is liable for the torts of either spouse. 10 A.L.R. 2d § 9 at 997.

That Arizona's Supreme Court is following in the direction of California and Texas is vividly shown by the 1964 decision in Gardner v. Gardner, 95 Ariz. 202, 388 P.2d 417 (1964). There it was held that alimony owed to a former wife by a husband could be collected from the community of the husband and the new wife. In short, what was clearly a separate debt of the husband was collected from the marital community.

The cases cited by appellants are prior to Gardner v. Gardner,



supra, do not support the principle that a marital community is not liable for the negligence of the corporate director husband unless the latter was serving a community purpose, and are based on a 1925 case which no longer supports the principle for which appellants cited it.

Thus, at page 12 of their opening brief, appellants make the incorrect statement that "the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse," and then cite as authority therefor six cases. The first, Cosper v. Valley Bank, 28 Ariz. 273, 237 P. 175 (1925), was expressly limited by the 1964 decision in Gardner v. Gardner, supra, to the narrow principle that "community property cannot be reached to satisfy separate contractual debts of the husband." The second case, Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936), after stating the principle as appellants do, immediately cited as its sole authority therefor Cosper v. Valley Bank, supra. Thus, it too has been limited by the Gardner case, supra. The third case, Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940) also cited Cosper v. Valley Bank as its sole authority for the broader statement of principle which was limited by Gardner v. Gardner, supra, when it narrowed Cosper v. Valley Bank, supra. The fourth case was Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116, in which this court cited Cosper v. Valley Bank, supra, and interpreted the law as

then holding that a judgment arising out of a transaction wholly regarding separate property and in no way affecting community interests could not be collected from the community. Therefore, Babcock v. Tam, supra, has also been narrowed by Gardner v. Gardner, supra, which interpreted Cosper v. Valley Bank, supra, as limiting collection against the community property of the separate contractual debts of the husband. The fifth case cited by appellants, Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948), after setting forth the broader statement set forth by appellants, cited as the authority therefor Cosper v. Valley Bank, supra, and Payne v. Williams, supra, both of which were restricted by Gardner v. Gardner, supra. The sixth and final case, Barr v. Petzhold, 77 Ariz. 399, 273 P.2d 161 (1954), is another of the pre Gardner v. Gardner, supra, cases in which the dicta stated the rule as urged by appellants.

It is plain therefore that the rule is not that "the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse", as previously set forth in the above cases all built on the foundation of the principle announced in Cosper v. Valley Bank, supra. The rule is simply that "community property cannot be reached to satisfy separate contractual debts." Gardner v. Gardner, supra. Therefore, the inference which was left by appellants' statement in the first paragraph of page 12

of their opening brief - that it is to be naturally expected that in order to hold the community liable for a tort claim against the husband, it is necessary to show that community purposes were being served and thus the debt was not a separate debt - is incorrect. Therefore, the cases which are cited thereafter from page 12 through page 22 of appellants' opening brief need to be examined to determine if they actually support appellants' thesis that with respect to tort claims, particularly those based on negligence, the community cannot be held liable therefor unless community purposes were being served.

First, at page 12 of their brief, an interesting statement is submitted. It is that "the community is liable for damages resulting from the acts of a spouse which are done while furthering a community purpose." The case cited in support is Hays v. Richardson, 95 Ariz. 64, 386 P.2d 791 (1963). The court is asked to note that appellants do not state or cite the Hays case, *supra*, in support of the contention that the community cannot be held liable unless some community purpose was being served by the tortfeasor husband. Instead all that is said is that the community is liable for damages resulting from the acts of a spouse which are done while furthering a community purpose. It is merely an inference which is left that the Hays case, *supra*, holds that the community cannot be held liable unless some community purpose is being served by the tortfeasor. However, the Hays case, *supra*, which was decided before Gardner v. Gardner,

simply pointed out that "it is undisputed that if one spouse is negligent while furthering a community purpose, the community is liable for damages resulting therefrom", and went on to find that a father driving to pick up his children who had participated in a television show was engaged in a community purpose. That is, the court was not required to rule on the question of whether the community can be held liable for the negligence of the husband while not furthering a community purpose. All that was necessary to dispose of the case was to point out that no one, regardless of the side taken, disagreed with the principle that if a father was engaged in furthering a community purpose, then obviously the community is liable, and that since community purposes were being served there it followed that the community was liable. For example, the instant appeal could be disposed of on the ground that the record shows community purposes were being served by appellant Angus J. DePinto, and therefore the community is liable for the subject negligence. But that would not amount to a holding by this court that the community can only be held liable in Arizona if the father tortfeasor was engaged in a community purpose when the tort was committed. In such an event it would not be correct to so cite the instant case. Therefore, it is not correct to so cite Hays v. Richardson, supra, when it did not decide more than it was required to decide.

The second case cited for its proposition respecting the tort liability of the community is McFadden v. Watson, 51 Ariz. 110,

74 P.2d 1181 (1938). But this case solely and expressly relied on Cosper v. Valley Bank, supra, to support the broad principle that "community property is liable only for community debts, and not for the separate obligations of either of the spouses." Since Cosper v. Valley Bank, supra, has severely restricted this rule now that it has been reinterpreted by Gardner v. Gardner, supra, this case does not support appellants' argument. McFadden v. Watson, supra, can no longer be correctly cited as meaning that a community is only liable for community debts and not for any separate debts.

The third case, cited at page 13 of their opening brief, is Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957). There the Arizona Supreme Court merely acknowledged a contention by the appellants there that the tort was not in furtherance of a community interest, and disposed of the case on the facts by finding that a community purpose was served. It did not take up the question of law as to whether the contention made by appellants was correct or not. It simply struck down their factual premise.

Appellants' fourth case in support of their inference that the community is liable for the tort of the husband only if committed while serving a community purpose is Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116. As noted earlier herein this case in another pre 1964 Gardner v. Gardner, supra, case in which this court correctly cited and relied on the broad rule of Cosper v. Valley Bank, supra, that

now has been restricted to the principle that the community property cannot be reached to satisfy the separate contractual debts of the husband. Also, this court then relied, as the Arizona courts did then, most heavily on the community property law of the state of Washington. Although Babcock v. Tam, supra, was a correct interpretation of Arizona law at the time it was decided, its Arizona law foundations have been swept away by Mortensen v. Knight, supra, and Gardner v. Gardner, supra, and the clear direction of the Arizona decisions since that time.

The fifth case cited by appellants is Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948). But this is one of the cases which relied on Cosper v. Valley Bank, supra, to support the principle that "community property is liable only for community debts and not for the separate obligations of either of the spouses." Then using that very broad principle to support the need to exclude everything which was a separate debt, it went on to review the Washington law and found that there a debt resulting from a malicious tort was a separate debt. The foundation of this case has been taken away by Gardner v. Gardner, supra, and it does not support the principle that the community is liable only for community debts and not for any separate debts or obligations of either spouse.

The sixth case cited by appellants, Perkins v. First National Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1926), falls under

the same disability since it too relied on Cosper v. Valley Bank, supra, to support the statement that "the community was not liable for a debt contracted by the husband in no way connected with the community and from which the community received no benefit." Thus, it too has been limited by the narrowed holding of Cosper v. Valley Bank, supra.

Appellants' seventh case is Payne v. Williams, supra, found at page 17 of their opening brief. As set forth earlier this case was also narrowed down by Gardner v. Gardner, supra, since it relied solely on Cosper v. Valley Bank, supra.

The foregoing cases, cited by appellant to support the principle that the community is liable for the torts of the husband only if committed while the latter was furthering a community purpose, all rest on the broad and earlier statement of the rule in Cosper v. Valley Bank, supra, that the community is liable only for community debts and not for the separate debts or obligations of either spouse. Based on such a rule it would follow that since the community was liable only for community debts, it therefore would be necessary to show that community purposes had been served in order to hold the community liable. However, Cosper v. Valley Bank, supra, now means, according to the Arizona Supreme Court, that the "community property cannot be reached to satisfy separate contractual debts of the husband." Thus, neither Cosper v.

Valley Bank, supra, nor the foregoing cases relying on it, support the principle for which they were cited by appellants. The major premise of appellants legal argument ~~can~~ be ~~that~~ the community is liable only for the tort of the husband committed while furthering a community purpose nor that the community is liable only for community debts. The only major premise available under the case law he has cited is that the community cannot be reached to satisfy the separate contractual debts of the husband, and that major premise will not support the conclusion that the community is liable only for torts committed while furthering a community purpose.

Appellants' line of case citations assumes that the case upon which they all rest, Cosper v. Valley Bank, supra, is still intact. It is not, and an examination of Gardner v. Gardner, 95 Ariz. 202, 388 P.2d 417 (1964), will show how badly damaged it is. There the Arizona Supreme Court said that the key question was whether alimony from a prior marriage is a contracted debt. It then decided it was not, and held that the community property of the husband and his new wife was liable for such separate debt. By limiting the Cosper v. Valley Bank, supra, case to the rule that the community cannot be reached to satisfy separate contractual debts of the husband and then finding that the answer to the key question was that it was not, thereby permitting collection against the community, the Arizona Supreme Court laid to rest the principle that the community is only liable for

community debts. The opinion did not even bother to discuss any need for a community purpose in order to hold the community liable.

The decision in Gardner v. Gardner, supra, and the action of the court in Mortensen v. Knight, supra, freeing the court from the restrictions placed on it by the Washington decisions and turning instead to California and Texas, shows that Arizona's Supreme Court does not adhere to the broad principle that the community cannot be held liable except for community debts. The fact that it ruled otherwise in Gardner v. Gardner, supra, after first restricting Cosper v. Valley Bank, supra, to the principle that "the community property cannot be reached to satisfy separate contractual debts of the husband", shows that Arizona law does not support appellants' contention that Arizona law says the community is liable only for community debts and not for any separate debts thereby requiring proof that the debt or tort obligation arose as a result of community purposes being served. There is no need to prove a community purpose was served in order to sustain liability against the community where the law no longer holds that the community is liable only for community debts. When the law is only that "the community property cannot be reached to satisfy separate contractual debts", the fact that the debt is not a contracted debt results in a ruling that the community is liable. That was the

reasoning of the Arizona Supreme Court in Gardner v. Gardner, supra, when it held that the "key question" was whether the debt involved there was contracted or not, and then imposed liability on the community when it determined the debt was not contracted. By the same reasoning here, the debt arising from appellant DePinto's breach of fiduciary duty and tort was not a contracted debt, and therefore the community is liable.

B.

Assuming The Arizona Law Is That The Community Is Liable Only For Community Debts And That It Therefore Cannot Be Held Liable For A Husband's Breach Of Fiduciary Duty Or Negligence As A Corporate Director Unless The Husband Was Furthering A Community Purpose Or Benefit, There Is No Genuine Issue Of Material Fact As To The Serving Or Furtherance Of Community Purposes By Angus J. DePinto While A Director Of United.

The district judge, after hearing evidence on the prayer for a preliminary injunction, examining the exhibits offered and admitted into evidence at such hearing, and possibly influenced by appellants' immediate approval of his suggestion that the entire case might be submitted on the basis of the evidence presented at the hearing on

the preliminary injunction, concluded there was no genuine issue of material fact with respect to whether appellant Angus J. DePinto had furthered or served one or more community purposes while accepting and acting as a director of United Security Life. Thus, because the appellants themselves advance and rely on the Arizona legal truism that the community is liable for a corporate director's negligence where he was furthering a community purpose while
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holding such office, it must follow that the motion for summary judgment was properly granted if the materials relied on by the district court reflect that there is no genuine issue of material fact as to any one or more community purposes having been fostered or served.

The first community purpose or benefit which the trial court found was as follows:

" In our free enterprise society the corporation is the specific organ through which a modern society discharges

4. R.T. at 194 contains the following:

" The Court: It seems to me if you both, if each side believes there would be no further evidence that would be presented, even on the final trial of this matter, that we might very well save everybody a lot of time if we could treat this as a hearing in this matter, a final hearing. "

Mr. Jenckes: We suggested that, your Honor, and I think counsel wouldn't agree.

Mr. McLane: We think, your Honor, we can produce considerable evidence if given time to prepare, that there were a multitude of additional benefits other than the ones we have spoken of here today to the community. "

The foregoing exchange shows that appellants had no further evidence.

5. Appellants' opening brief at 12, 16.

its basic economic functions. The directors of corporations hold great power and have become a major leadership group, and as such have great responsibilities to the enterprise and the people they manage, and to the economy and society. *

As a concomitant of such responsibilities and power, directors of corporations enjoy positions of prestige and high status in the community.

" Such status and prestige alone would, without anything else, confer a benefit upon the community of the plaintiffs. "

That such status and prestige constitute a community benefit was recognized by the Supreme Court of Washington while sitting en banc.

Kilcup v. McManus, 64 Wash 2, 771, 394 P.2d 375 (1964). There the court said:

" A community is liable for the tort of either spouse if the tort is calculated to be, is done for, or results in a benefit to the community or is committed in the prosecution of the community business. McManus acted under the color and authority of his public office, as a port commissioner and also as one holding a deputy sheriff's commission. As a port commissioner, he occupied a position of honor and public esteem, bringing these benefits to his community, ... "

(Underscoring supplied)

The foregoing recognition that a port commissioner received public

esteem and honor was not a finding based on testimony or affidavits but on the court's knowledge of the position's status and prestige. The same is true here of the district court's recognition of the prestige and status accorded corporate directors particularly those on the boards of publicly held corporations.

Nevertheless, appellants claim that the district court's "assumptions", as they label his findings, were "completely dissipated" by the testimony and affidavit of Dr. DePinto and by the affidavits of Dr. Lentz and Mr. Roca, an attorney. But what this amounts to is an argument that the findings of fact of a trial judge which are ultimate findings can be controverted by testimony which is the basis of his findings and affidavits filed after the findings are made. Certainly this would have no effect on such findings at the end of a trial, and the only question here is whether his findings can be so controverted after a hearing on a preliminary injunction has produced such findings and a motion for summary judgment has been filed. The answer is no if the rule requires "genuine" issues of material fact in order to deny summary judgment. It is also no if the affidavits and testimony offered in contravention of such findings are ultimate facts. And it also no if the affidavits are insufficient.

Assuming arguendo that such affidavits, filed several months after the findings of the district court were made, are sufficient in

law to create a genuine issue of material fact, the question is whether such affidavits did in fact do so.

Rule 56 (e), Federal Rules of Civil Procedure, governs with respect to the requirements for affidavits submitted in opposition to summary judgment. The rule is mandatory and states that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, as stated in 6 Moore, Federal Practice § 56.22 at 2327-2328:

" Affidavits containing statements made merely on 'information and belief' will be disregarded. Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit. The affidavit is no place for ultimate facts and conclusions of law, nor for argument of the party's cause."

Also, an affidavit containing immaterial matters is not available.

Turning to the three affidavits, and examining each insofar as the status and prestige finding is concerned, it is observed that the DePinto affidavit simply offers the conclusion that his directorship "could not and did not lend status or prestige" to him. This is merely

6. S.E.C. v. Payne, 35 F. Supp. 873, 876 (S.D. N.Y. 1940).

self serving opinion testimony of the litigant who is thereby arguing his case. It is clearly not based on personal knowledge since DePinto is not competent to testify whether, in the eyes of the community, many of whom do not have exalted opinions of their own status and prestige, such a position accords status and prestige to the holder hereof. That is, it may be true that former President Eisenhower or President Johnson would not obtain status or prestige from an appointment as a corporate director, but most lawyers and businessmen and physicians do. Also, DePinto's opinion would not be admissible in evidence, and is an ultimate fact. For these reasons the DePinto affidavit does not create a genuine issue of material fact respecting the district court's finding that his directorship in United gave the community status and prestige.

The affidavit of Dr. Lentz, which stated that he too was a member of the board of directors of a life insurance corporation hereby showing that he is equally interested with the DePintos in establishing a ruling relieving the marital community of liability, states flatly that it is inadmissible opinion evidence regarding the status and prestige finding when it states:

" It is the opinion of Affiant that Dr. DePinto's service as a member of the board of directors of United Security Life could not have been expected to, and did not, enhance the status or prestige of Dr. DePinto as a practicing obstetrician

or otherwise."

Such a statement would not be admissible since Dr. Lentz is not competent to so testify, is a statement of ultimate fact, is not based on personal knowledge as reflected by paragraph 3 thereof, and therefore does not create a genuine issue of material fact regarding the district court's finding that corporate directors enjoy positions of prestige and status.

On the other hand, the affidavit of Mr. Roca, who stated therein that he incorporated United Security Life, and who like Dr. Lentz is also a director of several corporations thus making him an interested party in obtaining a ruling discharging the community of liability, does not really attempt to create a genuine issue of material fact respecting the status and prestige finding. His affidavit simply states that:

"... any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto's status and prestige in the community."

The same objections exist with respect to such statement as with that of Dr. Lentz. More importantly, the statement is rendered meaningless by the qualifying clause at the beginning thereof

which states that it is based on the information contained in the preceding paragraph 5 which sets forth the dates of DePinto's directorship, that he attended no meetings, and owned no stock or received any compensation. How can such facts serve as the basis of a fact statement that his status or prestige in the community was not enhanced? The conclusion is a non sequitor. Also, it is noted that the statement was that "personal contacts" or "publicity" could not have given him status or prestige. However, the district judge did not so find. He found that the position of director itself gave one status or prestige because directors have become a leadership group with great powers and responsibilities. Men who occupy positions of power automatically bring status and prestige to their respective marital communities. The affidavit of Mr. Roca is inadmissible opinion testimony, is not based on personal knowledge as the affidavit itself acknowledges, does not show affirmatively that the affiant is competent to testify, is a statement of ultimate fact, and on its face is not supported by the very paragraph it relies on. Consequently, it creates no genuine issue of material fact concerning the finding that corporate directors enjoy positions of prestige and status.

The three affidavits are not sufficient to create a genuine issue of material fact concerning the district court's finding that corporate directors enjoy positions of prestige and status.

The second community benefit or purpose found by the district court was:

"... the circulation of the plaintiff's husband's name to members of the public to whom stock in the defendant corporation was being sold, this resulting in an ethical form of advertising for a physician and surgeon. Similar benefits flow from the circulation of his name among the policyholders and the other directors in the defendant insurance company."

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While the district court did not mention it, the record here and in Civil No. 2974 showed that DePinto was a businessman as well as a physician, having successfully managed real estate valued years ago at \$500,000, and which in the current bankruptcy proceeding is listed at \$754,109.44. Thus, the publicity he received, when 25 to 40 stock salesmen were selling stock with a prospectus publicizing him, also obtained for the marital community advertising helpful to a businessman.

As to this second finding, the affidavit of DePinto merely says that such circulation of his name did not constitute advertising of his medical practice. However, he testified that he could not say where most of his patients came from, is clearly not competent to testify what the public thought about such publicity thus making

the statement not admissable, and is offering an ultimate fact.

The affidavit of Dr. Lentz on the point is preceded by the statement that it is his opinion, and is otherwise flawed as DePinto's affidavit. The statement in the Roca affidavit is not based on personal knowledge, is one of ultimate fact, is inadmissable, is nothing more than a conclusion, and is not supported by the paragraph it rests on.

Therefore, there is no genuine issue of material fact as to the finding that the DePinto community obtained a benefit from the circulation of DePinto's name among the public, policyholders, and other directors.

The third community purpose or benefit found by the district court was the following:

" Even the assertion by the plaintiff-husband that he took a place on the Board of Directors in order to accomodate a friend of the plaintiff, fostered a community purpose by fostering the friendship between the DePinto marital community and the Kelly marital community. "

Here the affidavit of DePinto does not even attempt to respond. It sidesteps the finding by saying:

" The friendship between the DePinto family and the family of James E. Kelly did not depend upon Affiants' service as a member of the board of directors of United

But the district court did not find that the DePinto-Kelly family friendship was dependent on DePinto's service as a director of United. It found that such action fostered the said friendship and thereby served a DePinto marital community purpose. The said statement of DePinto's is also insufficient to create a genuine issue of material fact for the same reasons set forth with respect to the first two findings of the district court. And since neither the Lentz nor the Roca affidavit even refer to the fostering of the DePinto-Kelly family friendship as having served a DePinto marital community purpose, neither creates a genuine issue of material fact on this finding.

In addition to the foregoing findings of community purpose and community benefits obtained by the DePinto marital community, the district court also acknowledged the effect of the holding in Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116, on the issue of community benefit. The relevant part of the Babcock, supra, opinion stated:

"... there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community."

Thus, the district court ruled:

But the district court did not find that the DePinto-Kelly family friendship was dependent on DePinto's service as a director of United. It found that such action fostered the said friendship and thereby served a DePinto marital community purpose. The said statement of DePinto's is also insufficient to create a genuine issue of material fact for the same reasons set forth with respect to the first two findings of the district court. And since neither the Lentz nor the Roca affidavit even refer to the fostering of the DePinto-Kelly family friendship as having served a DePinto marital community purpose, neither creates a genuine issue of material fact on this finding.

In addition to the foregoing findings of community purpose and community benefits obtained by the DePinto marital community, the district court also acknowledged the effect of the holding in Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116, on the issue of community benefit. The relevant part of the Babcock, supra, opinion stated:

"... there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community."

Thus, the district court ruled:

" The positive rewards that could have been realized or were realized by the plaintiffs by reason of plaintiff-husband's service as a director are limited only by the number of reasonable inferences that could be drawn from the fact of his service. "

That is, the widening of DePinto's business and real estate associations through his fellow directors and some policyholders, the widening of acquaintances at the director's meeting he attended in March of 1955 in a setting which presented DePinto favorably as a physician and businessman, the obtaining of information from fellow directors about sources of mortgage financing from other insurance companies for his many real estate ventures, the opportunity to participate in directors meetings and thereby obtain the benefits of the business experience of other men as expressed by their views and judgments, the fostering of his business relationship with J. L. Jenkins as a fellow director, and the opportunity to appraise potential employees for his own business activities, are all benefits which were available to the DePinto community some of which were in fact realized by it.

The foregoing demonstrates that there were several community benefits or purposes achieved by DePinto's directorship in United, and about which there is no genuine issue of material fact. Appellants virtually conceded there was no genuine issue from their point of

view when they suggested that the evidence at the hearing on the preliminary injunction be considered as sufficient for a final hearing. The change of mind did not occur until after the district court denied the preliminary injunction and made the findings respecting community purposes and benefits at which point the three affidavits were filed in response to the appellee's motion for summary judgment. This chain of events leads to the conclusion that the issue of fact, if any, is not a genuine issue. However, when the findings are examined, it is apparent that there is no issue of fact concerning the several community purposes which were furthered by DePinto's directorship in United. Therefore, what is the point of appellants' appeal even if the district court and this court agreed with their version of the Arizona law and held that a marital community in Arizona is only liable for community debts and not for any separate debts or obligations of either spouse? The district judge has heard appellant DePinto testify, had read the affidavits of Dr. Lentz and Mr. Roca, and concluded that several community purposes or benefits had actually been realized.

There is one finding by the district court which was uncontradicted by the testimony and affidavits and which, standing alone, is sufficient to demonstrate that a community purpose was served by DePinto's directorship in United. That is the finding

that taking a place on United's board of directors fostered a community purpose by fostering the friendship between the DePinto marital community and the Kelly marital community. Nor is the finding avoided by appellants' contention that:

" We submit that, under the law of the State of Arizona, the community cannot be held liable for an act of the husband which is performed solely as an accomodation to a friend. "

However, this begs the issue. The fact that a community purpose was served cannot be refuted by arguing that the law relieves the community of liability if no community purpose was served as where the husband acts solely as an accomodation for a friend. The finding that a community purpose was served excludes the finding that the husband acted solely as an accomodation to a friend.

Also, the fact that a community purpose was so served has not been avoided by appellants' reliance on the two Washington cases of American Surety Co. of N.Y. v. Sandberg, 9 Cir., 1917, 44 F. 701, and Sun Life Assur. of Canada v. Outler, 172 Wash 540, 10 P.2d 1110. First, appellants have presented these two cases to the court with a quotation from the 1938 Arizona Supreme Court case of McFadden v. Watson, supra, that: "We have always held that our community property law was more like that of the state of Washington than any of the other community property states, and

that the decisions from that state were very persuasive." As noted earlier this practice was rejected by the Arizona Supreme Court in Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956) wherein it turned to California and Texas and said the Washington cases, while informative, are not necessarily more persuasive than those of California or Texas. Second, and as the district judge noted here, the cases are not analogous. Here the appellants were not irrevocably committed to the possibility of a debt, but, as a director, the appellant husband had within his control the benefits he could realize for the community. He had the power and right to vote for fees for himself for performing services as a director, and the power to avoid any liability to his community by carrying out his duties as required by law. Thus, there were several community benefits or purposes to be obtained. On the other hand, in the two Washington cases, the courts pointed out that there was no possible chance for the community to obtain a benefit. The same distinction also applies to appellants' citation of Perkins v. First National Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1926). Third, if as the Arizona Supreme Court held in Hays v. Richardson, 95 Ariz. 64, 386 P.2d 791 (1963), the husband's act of driving the children to a television show constituted being "engaged in a community purpose", it is difficult to envision the same court holding that the fostering of a family friendship did not suffice in law as being engaged

in furthering a family purpose.

What appellants have done is ignore the variety of things about DePinto's directorship in United which did in fact serve a community purpose, or which "could be said to be beneficial" to the marital community, and claimed that his act was solely to help a friend. Then based on that faulty factual premise, the appellants contend that in law that is analogous to have signed a note as a guarantor or an indemnity agreement. By referring to such guarantor or indemnitor as having accomodated his friend and then labeling the assumption of his directorship in United as having accomodated his and his family friend Kelly, the argument is constructed that this case is the same as the Perkins case, supra, and the Washington cases involving the guarantee of a note or signing an indemnification agreement. The application of such law is equally as incorrect as the factual premise used.

Appellants conclusion that "there is no evidence which supports, in any way, the conclusion that Dr. DePinto's services upon the Board of Directors of United were in furtherance of a community purpose" is not borne out by the record. Further such statement is beside the point even if it were correct. The case cited by appellant Babcock v. Tam, supra, did not require evidence that a community purpose was in fact served. Rather, and just as the Washington Supreme Court did in Kilcup v. McManus, 64 Wash 2, 771, 394 P.2d 3

the court itself looked to see whether the husband had engaged in something which "could be said to be beneficial" to the marital community. In that case the court ruled that the honor and public esteem from the position of port commissioner was sufficient to bring a benefit to the marital community. Here the district judge found that corporate directors, having power and responsibilities, also obtain as a concomitant of such power and responsibilities, status and prestige in the community in which they live. Would or should the Supreme Court of Washington pay attention to an affidavit filed by the appellant in the Kilcup case, supra, that the port commissioner did not have public esteem and honor, or affidavits containing the opinion of those in the same position as Kilcup that such commissioner had no such prestige or status?

There is no genuine issue of material fact as to several of the findings of the district court that DePinto community purposes were furthered by DePinto's directorship on the board of United. Therefore, assuming the law of Arizona was as the appellants claim - the community is liable only for community debts and not for any separate debts or obligations of either spouse - the district court found one or more community purposes or community benefits to have been obtained as a result of DePinto's directorship in United Security Life. As a result, the motion for summary judgment was properly granted.

The District Court Did Not Err In Denying Appellants'

Prayer For Preliminary Injunction.

A prayer or motion for an injunction pendente lite is addressed

to the judicial discretion of the district court. United States v. Corrick

298 U.S. 435; Ross-Whitney Corp. v. Smith Kline & French Lab.,

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9 Cir., 1953, 207 F.2d 190; 3 Moore, Federal Practice § 65.04 (2)

at 1630. The test on appeal is not whether the appellate court in its

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discretion would have granted or denied the injunction, but whether

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the district court has abused its discretion. It is, therefore, not

sufficient for a losing party simply to contend on appeal, as appellants

have here, that the district court should be reversed on the ground

that "it is apparent that, after a trial on the merits, appellants will

be entitled to a decree enjoining appellees from having judgment in

Cause No. Civ. 2974 Phx satisfied out of their community property." 1

And since appellants have nowhere argued or shown specifically or

8. Meccano, Ltd. v. John Wanamaker, 253 U.S. 136; Mayo v. Lakeland

Highlands Canning Co., 309 U.S. 310; Rice & Adams Corp. v. Lathrop

278 U.S. 509; Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 F.2d 647; Lane Bryant v. Maternity Land, 9 Cir., 1949, 173 F.2d 559, 2d 647; Doeskin Products v. United Paper Co., 7 Cir., 1952, 195 F.2d 356.

9. Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 F.2d 647; Benson Hotel Corp. v. Woods, 8 Cir., 1948, 168 F.2d 694; Sinclair Refining Co. v. Midland Oil Co., 4 Cir., 1932, 55 F.2d 42.

10. See cases cited in ftnt. 8 above.

11. Appellants' opening brief at 22-23.

otherwise that the district court abused its discretion in denying the prayer for a preliminary injunction, it is not possible for appellees to respond thereto. For this reason alone, appellants' appeal from the district court's denial of an injunction pendente lite should be dismissed. Appellants' specification of error with respect to the denial of the preliminary injunction states that the district court erred "for the reason" that appellants would suffer irreparable harm if their community property were sold under execution to satisfy the judgment in Civil No. 2974. However, this misses the point.

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In Yakus v. United States, 321 U.S. 414, Chief Justice Stone stated:

" The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. ... Even in suits in which only private interests are involved the award is a matter of sound judicial discretion,

12. When there is a direct appeal to the Supreme Court from an order granting or denying an interlocutory injunction, Supreme Court Rule 15 (1) (g) requires the jurisdictional statement to include a showing of the matters in which it is contended that the district court has abused its discretion. It should follow that appellants appeal on this issue should be dismissed since they have not even argued the abuse of discretion by the district judge. The time to raise such arguments is not in the reply brief when appellees have no opportunity to answer and not in oral argument when appellees have had no opportunity to prepare a reply. Orderly procedure and fair notice to the adverse litigant is an important aspect of administering justice.

in the exercise of which the court balances the conveniences of the parties and the possible injuries to them according as they may be affected by the granting or withholding of the injunction. . . . And it will avoid such inconvenience and injury as far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained."

Thus, the fact that irreparable harm may result, assuming that it would, is not sufficient basis for reversing a district court which has denied a preliminary injunction. The losing party must assert as error and show that the district court abused its discretion in denying an injunction pendente lite. Alabama v. United States, 279 U.S. 229, 230-231 (1929).

The rule was stated by this court in Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 F.2d 647, 650:

" . . . we should first observe the limited scope of review which is permitted us from a temporary injunction. . .

" We know of no better statement of this principle than is found in Love v. Atchison T. & S.F. Ry. Co., 8 Cir., 185 F.2d 321, 333, as follows: 'But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where,

as in the case at hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused its discretion * * * An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law entrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?"

Thus, appellants appeal from the denial of the preliminary injunction is defective not only because they failed to raise and argue this question but because the proof does not clearly establish an abuse of that discretion.

Even if this court should decide to examine the question of abuse of discretion by the trial judge although not assigned as error, it may wish to recall that it has already denied these appellants an injunction pending appeal on September 20, 1965 after the submission of lengthy briefs.

There is another reason why the district judge should not be reversed for denying the preliminary injunction. The district court

held that there exists in Arizona the legal presumption that a debt incurred by a married man during coverture is a community obligation and the burden of proof in overcoming it was on appellants. Donato v. Fishburn, 90 Ariz. 210, 367 P.2d 245 (1961); Osborne v. Mass. Bonding and Insurance Co., 229 F. Supp. 674 (D.C. Ariz. 1964). The district judge ruled that appellants had not overcome that burden. In addition there is also a rule in Arizona, not referred to by the district court, that "the presumption of law is, in the absence of a contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community." Benson v. Hunter, 23 Ariz. 132, 202 P. 233 (1921).

There is a third and fourth reason why the denial of the preliminary injunction should not be reversed. As was noted more fully at pages 11 through 25 in appellees' earlier memorandum herein opposing appellants' motion for an injunction pending appeal, (a) the order denying the preliminary injunction is not an appealable order within the provisions of 28 U.S.C. 1292 because it was a denial of a motion for a stay of proceedings or a motion for a stay of execution in Civil No. 2974 and therefore not a denial of a preliminary injunction, and (b) an injunction pending appeal should not issue because to do so would defeat the requirements of Rule 73 (d) and 62 (d) requiring the posting of a supersedeas bond to

stay execution in Civil No. 2974.

Next it is noted that appellants' current request that this court order the issuance of a preliminary injunction by the district court is simply a renewal of their earlier motion herein for an injunction pending appeal which motion was denied September 14, 1965. Since appellants have submitted less now than was submitted in their earlier motion, the present request should also be denied. Appellee repeats by this reference thereto the contentions set forth in his memorandum opposing appellants' motion for injunction pending appeal.

Finally appellee asks the court to reject appellants' implicit and unsupported assumption that it should, if it ordered that the district court be reversed for denying the preliminary injunction, also take away from the district court the authority and discretion to order such bond, after a hearing, as the district court deemed necessary to protect the party against whom the injunction would be issued. Appellants have cited no authority to support such a principle.

For the reasons that appellants have neither briefed the point nor assigned as error that the trial court abused its discretion in denying the preliminary injunction, the appeal from such denial should be dismissed because it has been abandoned. Peck v. Shell Oil Co., 9 Cir., 1944, 142 F.2d 141, 143; Stetson v. United States,

9 Cir., 1946, 155 F.2d 359, 361. For the reasons set forth in the preceding paragraphs of this Point II, the appeal from the order denying the preliminary injunction should be denied and the order affirmed.

Conclusion

In their argument appellants have not shown or attempted to show that there was a genuine issue of material evidentiary fact present in this case which would have precluded the lower court from entering summary judgment. The only issue in this case, and that to which appellants have limited their argument, is whether or not under the applicable law the appellees were entitled to summary judgment. It is respectfully submitted that appellants have failed to carry their burden of showing that appellees were not entitled to judgment under the applicable law and that the applicable law, as set forth in the foregoing argument of appellees, fully supports the judgment entered by the trial court. Said judgment should, therefore, be affirmed.

Respectfully submitted,

MC LANE & MC LANE



William Lee McLane

Nola McLane

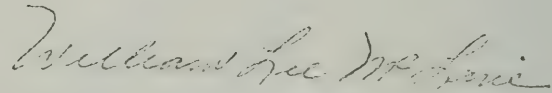
Attorneys for Appellee

Albert J. Doig

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: August 3, 1966.

A handwritten signature in cursive script, reading "William Lee McLane".

William Lee McLane

No. 20308

(No. 20656 Consolidated)

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DEPINTO and MARGARET F. DEPINTO,
Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of
the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY,
and ALBERT J. DOIG,

Appellees.

FEB 7 1967

**Reply Brief of Appellants,
Angus J. and Margaret F. DePinto,
and Intervenor-Appellant, James P. Donohue**

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Appellees.

Reply Brief of Appellants, Angus J. and Margaret F. DePinto, and Intervenor-Appellant, James P. Donohue

Preface

In the preparation of their Reply Brief, appellees deemed it appropriate to go outside the record and say: "It is equally important to focus attention on the fact that appellants are no longer the real litigants here, but are merely nominal parties who have no stake in the outcome of this litigation or that other pending appeal entitled DePinto and Donahue v. Providence Security Life Insurance Company Dck. No. 20553, 9 Cir. * * * Appellants

are merely bystanders. * * * The foregoing reflects that those who are appealing here in the guise of protectors of the sanctity of marital community property anxious to prevent fraud against a wife are actually commercial general creditors of the bankrupt community who are being led into battle by Massachusetts Mutual Life Insurance Company and the Trustee in Bankruptcy. * * * However, question is raised as to the validity of invoking here the sanctity of the community property when that marital community is hopelessly insolvent and neither member of that community can obtain one dollar of benefit from the decision which the general creditors request in the name of the marital community." In response to appellees, we can only represent to this Court that if, in this action, the judgment against DePinto in *Doig v. DePinto and Provident*, Civ. No. 2974-Phx., is determined not to be a community obligation, there is every reason to believe that (after the major portion of the community obligations have been satisfied from a sale of the real property mortgaged by Trosco Land, Inc.) the community assets will exceed the obligations. The DePintos will, thus, be very substantially benefited by a reversal of the judgment herein. Needless to say, the attorneys for the DePintos herein are, in the prosecution of this appeal, acting, solely and exclusively, for the DePintos.

Argument

1.

RECORD DOES NOT SUPPORT SUMMARY JUDGMENT

(a) The Law.

Appellees have reviewed the cases cited in our Opening Brief for the purpose of attempting to demonstrate that the law in Arizona is something other than the Supreme Court of Arizona has stated. They say that, in Arizona, "the rule is simply that 'community property cannot be reached to satisfy separate *contractual* debts.' " We submit that even a casual reading of the Arizona

cases cited in our Opening Brief will disclose that it is the law, in the State of Arizona, that (a) the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse; (b) in a tort action there can be no recovery against the community unless the spouse was negligent while furthering a community purpose; and (c) an act done merely as an accommodation to another or because of friendship will not be considered as furthering a community purpose. The case of *Gardner v. Gardner*, 95 Ariz. 202, 388 P.2d 417, so heavily relied upon by appellees, recognizes but one very limited exception to these general rules and which the Court expressed as follows:

“Essentially, our decision in this case rests on public policy. The obligations of marriage cannot be thrown aside like an old coat when a more attractive style comes along. An alimony debt from a previous marriage can be satisfied out of the community property.”

Obviously, an alimony debt from a previous marriage has no conceivable relationship to a tort obligation incurred during marriage.

Appellees argue that, in Texas and California, community property is liable for the torts of the husband, whether committed while serving a community purpose or not. They point out that in *Mortenson v. Knight*, 81 Ariz. 325, 305 P.2d 463, the Supreme Court of Arizona said:

“From the foregoing we are compelled to conclude that the decisions of the State of Washington, while informative, are not necessarily more persuasive than either of those of the States of California or Texas.”

The Court went on to hold that the family car doctrine applies to a community-owned automobile. Not even the most adroit legal gymnastics can twist the opinion of the Court into a substitution of the laws of California and Texas for the settled law of Arizona.

(b) The Facts.

We concede that there can be little dispute about the evidentiary facts in this case. When DePinto served on the Board of Directors of United, he had no direct or indirect financial interest in the company. He served on the Board of United purely as a matter of friendship for Kelly; he thought he "needed a helping hand". There is nothing whatsoever in the record to contradict the testimony of the DePintos and the affidavits of DePinto, Lentz and Roca. On this state of the record, the lower court would have been justified in granting a summary judgment for appellants. The effect of what the lower court did was to decide, as a matter of law, that where a husband serves as a member of the Board of Directors of a corporation, he is *ipso facto* furthering a community purpose. In the case of *Cameron v. Vancouver Plywood Corp.*, 266 F.2d 535 (9th Cir. 1959), this Court stated:

"In deciding whether there is a genuine issue as to any material fact, the circumstance that a particular pleading deposition, admission, or affidavit is taken as true is not determinative. An issue of fact may arise from the counter-ing inferences which are permissible from evidence accepted as true. As stated in *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 388-389, 33 S.Ct. 523, 533, 57 L.Ed. 879, '* * * the admission [of facts on demurrer] * * * must be of the facts, and not merely the evidence from which their existence is inferable. * * *' See, also, *Guerrero v. American Hawaiian Steamship Co.*, 9 Cir., 222 F.2d 238, 243.

"All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Toebelman v. Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F.2d 1016."

And, in *Consolidated Electric Co. v. United States*, 355 F.2d 437 (9th Cir. 1966), this Court said:

"If, viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the party opposing the motion, we can see that there is no

genuine issue of fact, then the granting of a motion for summary judgment should be sustained. *United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 575 (9th Cir. 1964); see generally *Wright, Federal Courts* § 99 (1963)."

It is obvious that in drawing inferences from the evidence as a whole, the trial court ignored the rule that he must do so "in the light most favorable to the party opposing the Motion". In the face of the diametrically opposed evidence, the trial court concluded that DePinto's service on the Board of United was in furtherance of a community purpose because (a) such service would increase the status or prestige of the DePintos; (b) such service would result in the advertising of DePinto's practice as an obstetrician; and (c) such service would "foster" friendship between the Kellys and the DePintos. This Court can take judicial notice that serving on the Board of Directors of the Ford Foundation, Stanford University or American Telephone & Telegraph Company might, in the eyes of some people, be considered a status symbol. But, to equate one of those institutions with United Security Life, is to abandon reality and common sense.

To infer that DePinto secured "advertising" for his medical practice by serving on the Board of United, is to completely ignore the record. DePinto had a flourishing medical practice and had no need for "advertising". Furthermore, there is no evidence whatsoever that his association with United resulted in any member of the public becoming aware that DePinto was a practicing obstetrician.

It cannot be denied that DePinto served on the Board of United as a matter of friendship to Kelly. But, as we have seen, an act prompted by friendship, or even close family relationship, will not thereby be deemed to be in furtherance of a community purpose.

In the case of *Mortenson v. Knight, supra*, the Supreme Court of Arizona explains that the marital community is not an entity

for which the husband acts as agent. The Court said: "It is true that the law does consider it expedient and necessary in business transactions affecting the community personalty that there be a person with the power to act. The husband may be loosely designated as the agent of the wife in the management and disposition of her interest, yet the analogy is quite obviously misleading when applied to the relationship of the husband to his half interest. * * * Moreover, settled judicial construction in this state recognizes the husband's dominance in the management and control of the common property."

This Court will appreciate that in serving upon the Board of United, DePinto did not purport to exercise any control over "the common property". As the agent of the wife in the management of her interest in the community, was DePinto acting within the scope of such "agency" when he engaged in an activity which could not have been of any benefit to such interest and which exposed such interest to a possible liability of hundreds of thousands of dollars? If the DePinto community assets can be wiped out by the improvident and gratuitous acts of the husband, then the wife is completely at the mercy of her "agent". Fortunately, that is not the law in Arizona.

2.

PRELIMINARY INJUNCTION

In opposing our argument that the trial court erred in failing to grant a preliminary injunction, appellees do not challenge our contention that appellants would suffer irreparable injury if the injunction were denied. Rather, they say that the denial of a preliminary injunction is within the discretion of the trial court and that we have not charged the trial court with abuse of discretion. We suggest that when we specified error on the part of the trial court in failing to grant a preliminary injunction, there was implicit therein the charge that such failure constituted an abuse of

discretion. If, as we contend, the evidence supported the conclusion that appellants were entitled to a permanent injunction and that irreparable injury would result from delay in granting such injunction, it would seem obvious that the trial court abused its discretion in failing to grant a preliminary injunction.

Respectfully submitted,

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Anthony O. Jones
*Attorneys for James P. Donohue,
Trustee in Bankruptcy of the
Estate of Angus J. DePinto*

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.
Joseph S. Jenckes, Jr.

